U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 April 2007

CASE NO.: 2006-LHC-28

OWCP NO.: 08-116340

IN THE MATTER OF:

J.P.,

Claimant

v.

STRACHAN SHIPPING COMPANY,

Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.,

Carrier

APPEARANCES:

DENNIS L. BROWN, ESQ.
For The Claimant

MELINDA RICH HARPER, ESQ.
For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by J.P. (Claimant) against Strachan Shipping Company (Employer) and Signal Mutual Indemnity Association, Ltd. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on May 3, 2006, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Employer proffered one hundred and seventy-one (171) exhibits, one-hundred and sixty-eight (168) of which were admitted into evidence.[1] Claimant offered thirty (30) exhibits, which were admitted into evidence along with seven (7) Joint Exhibits. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witness, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

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[1] Pursuant to Employer/Carrier's request, the record in this matter was held open following the formal hearing to allow it to submit exhibit numbers one hundred sixty-four (164), one hundred sixty-five (165), and one hundred sixty-seven (167) which had not been obtained as of the date of hearing. These exhibits were never provided and, therefore, are excluded from the record.

[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___, p.___; Employer/Carrier's Exhibits: EX-__, p. ___; and Joint Exhibits: JX-_____, p. ___. Employer/Carrier's, Claimant's, and the parties' Joint exhibits contained many duplicates as indicated below. Where duplicates exist, references will generally be made to only one exhibit. The following exhibits, among others, were duplicates: CX-1, p. 1 and EX-20, p. 1; CX-2, p. 1 and EX-24, p. 1; CX-3, p. 1 and EX-6, p. 1; CX-4, p. 1 and CX-26, p. 3 and EX-17, p. 1; CX-5, p. 1 and EX-5, p. 1; CX-6, p. 3 and JX-2, p. 16; CX-6, p. 4 and JX-2, p. 15; CX-7, pp. 1-2 and JX-2, pp. 18-19; CX-8, pp. 1-2 and JX-6, pp. 14-15; CX-8, pp. 3-4 and JX-6, pp. 51-52; CX-9, p. 1 and JX-6, pp 29, 81; CX-9, p. 2 and JX-6, p. 25; CX-9, p. 3 and JX-5, p. 36 and JX-6, p. 26; CX-10, p. 1 and JX-4, p. 25; CX-11, p. 11 and JX-6, p. 39; CX-13, p. 1 and JX-6, p. 84; CX-14, p. 1 and EX-19, p. 1; CX-23, p. 1 and EX-3, p. 1; CX-26, p. 1 and EX-8, p. 1; CX-26, p. 2 and EX-16, p. 1; and CX-26, p. 4 and EX-14, p. 1; and CX-27, p. 1 and EX-15, p. 1.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-7, p. 1), and I find:

1. That the Claimant was injured on April 16, 1999.

2. That "if Claimant was injured on April 16, 1999," Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on April 20, 1999.

5. That Employer filed a Notice of Controversion on October 4, 1999, June 26, 2001, February 12, 2002 and October 25, 2002.

6. That an informal conference before the District Director was held on November 2, 1999 and February 1, 2005.

7. That Claimant received temporary total disability benefits from April 17, 1999 through June 11, 1999 at a compensation rate of $756.74 and received temporary partial disability benefits from July 16, 2000 to June 9, 2001 at a compensation rate of $756.74 in addition to medical benefits.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation.

2. The nature and extent of Claimant's disability.

3. Determination as to when, or if, Claimant reached maximum medical improvement.

4. Entitlement to medical care and services.

5. Claimant's "post-injury average weekly wage and compensation rate."

6. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

Background

On April 16, 1999, Claimant was working as a rigger aboard a vessel. (Tr. 86, 89). That afternoon Claimant attempted to remove some lashing rods that were lying between two hatches. (Tr. 86, 88). While attempting to remove the rods, Claimant slipped and fell and landed on his knees, injuring his knees in addition to his left ankle. (Tr. 86-87). Claimant filed a claim for compensation on August 6, 1999. (CX-3, p. 1).

Prior to April 16, 1999, Claimant had a history of knee problems with a first documented injury in 1977. (Tr. 130-131). From 1977 up to but not including April 16, 1999, Claimant suffered at least three (3) injuries to his left knee and underwent at least five (5) surgeries to his left knee. (Tr. 149). Claimant also suffered at least four (4) injuries to his right knee and underwent at least three (3) or four (4) surgeries to his right knee. (Tr. 149-150, 166-167). Following his April 16, 1999, accident, wherein he claimed to have injured his knees and his left ankle, Claimant was told he needed to undergo bilateral total knee replacement. (Tr. 113; JX-2, p. 16). Employer/Carrier refused to authorize the surgeries as Employer/Carrier disputes causation as to what gave rise to Claimant's need for bilateral total knee replacement -- a hereditary trait or an aggravation of an underlying condition. Employer/Carrier also disputes a causal link between Claimant's need for total knee replacement of his right knee and his April 16, 1999 accident. Through his claim for compensation, Claimant is seeking medical benefits, including bilateral total knee replacement, as well as "lost wages" from 2005 to 2006. (Tr. 126).

The Testimonial Evidence

Thomas Isbell

Thomas Isbell is President of the International Longshoreman's Association (ILA) Local 24. (Tr. 26-27). Prior to being President of ILA Local 24, Mr. Isbell served as a business agent, alternate vice president, board member and auditor. In all, Mr. Isbell has held an office in some capacity or another with ILA Local 24 for at least ten (10) years. As President, Mr. Isbell is required to, among other things, ensure

the union provides good laborers to employers and that union contracts are upheld. (Tr. 27). As a business agent, Mr. Isbell handled all orders from employers for labor as well as all complaints from employers regarding laborers, organized all employment boards in addition to core gangs, hired some laborers, and coordinated all clerical tasks required to be completed through the dispatch system. According to Mr. Isbell, his years of service with ILA Local 24 have provided him with working knowledge of the type of work and physical requirements needed for employment through ILA Local 24. (Tr. 28).

ILA Local 24 provides employers in the Harris County, Texas area with laborers to load and unload floating structures. Members of ILA Local 24 basically perform any variety of tasks related to loading and unloading cargo, including tying and untying cargo, and operating cranes. (Tr. 29). In addition to providing employers with laborers, ILA Local 24 also tracks and compiles members' work histories, including type of work performed, hours worked, and pay received. (Tr. 29-30). ILA Local 24 compiles members' work histories to track their seniority within the union. (Tr. 30-31). If a member is injured and off work for a time, ILA Local 24 awards the member hours, referred to as medical hours, so as to not allow the injury to adversely affect the member's seniority. (Tr. 31).

Currently, ILA Local 24 has approximately 48 to 50 Sections that constitute its seniority system. (Tr. 32). Employment through ILA Local 24 is assigned to members based on their level of seniority with employment first being offered to members with greater seniority. (Tr. 33). For employment offers to members in the same seniority section, it is up to a foreman to determine the best qualified individuals within that section for the positions. (Tr. 33-34). A foreman is not permitted to bypass a member of any seniority section for a member in another section simply because the senior member suffers from a disability. (Tr. 34).

West Gulf Maritime Association, like ILA Local 24, tracks the work history of maritime workers, including type of work performed, hours worked, and pay earned. (Tr. 41). Under West Gulf Maritime Association's tracking system, work performed is categorized by a job code number. (Tr. 42). Job code 170 represents a gang foreman, code 100 represents a basic working man in the hold of a vessel, code 126 represents a longshore and lashing securing carpenter without his own tools, code 103 represents a deck operation worker, code 109 represents a worker who works on the dock and vessel as needed, code 106 represents

a dock operation worker, code 124 represents a class II truck driver who operates yard trucks, and code 172 represents a gang foreman responsible for securing a gang. (Tr. 42-44).

Besides working for ILA Local 24, Mr. Isbell has also worked as a longshoreman. He began work as a longshoreman in September 1977. (Tr. 27). As a longshoreman, Mr. Isbell held a variety of jobs requiring him to perform tasks such as throwing bags, driving trucks, running cranes, and driving forklifts. (Tr. 28). Mr. Isbell knows Claimant from his work as a longshoreman and through his service with ILA Local 24, and knows Claimant to have a very good reputation as a longshoreman, always completing every job to which he was assigned, taking each job seriously, and expecting the same of others. (Tr. 29). He also knows Claimant to be a very honest, blunt individual. (Tr. 48). According to Mr. Isbell, Claimant's seniority within ILA Local 24 in 2005 was Section 35. (Tr. 32). Generally, members with greater seniority within ILA Local 24 like Claimant are only offered employment on fully automated vessels or automobile vessels. (Tr. 34, 40). Employment on fully automated vessels involves loading and unloading of containers and is ILA Local 24's top paying positions. (Tr. 34).

Claimant, according to Mr. Isbell, works as a gang foreman, a position which is part of ILA Local 24's specialty boards. Other specialty boards include crane operators, truck drivers, foreman that secure a core gang, heavy lift boards, payloader board, porter board, and store foreman. (Tr. 35). Generally, a member of one board cannot be a member of another board, except for members of the porter board. (Tr. 35-36). According to Mr. Isbell, there are approximately thirty-five (35) members on the gang foreman specialty board. (Tr. 36). The position of gang foreman requires the foreman to hire a gang as well as to supervise and manage the gang. (Tr. 37). Physical mobility is required of a gang foreman in performing his duties since his supervision and management of the gang requires him to traverse the vessel to ensure the gang adequately performs their duties. (Tr. 37-38). Therefore, a gang foreman's duties make it impossible for a foreman to sit or stand on the dock all day. (Tr. 38). In Mr. Isbell's opinion, a gang foreman who suffers from knee problems would have difficulties fulfilling the duties of a gang foreman since his ability to traverse the vessel would be hampered by his physical limitations. (Tr. 39). A gang foreman may choose to forego an employment opportunity. However, according to Mr. Isbell, gang foremen usually do not forego such opportunities since in doing so they would not get paid. (Tr. 40).

Although Mr. Isbell was not aware of Claimant suffering prior injuries to his knees in the seventies and eighties, Mr. Isbell stated Claimant has always returned to work and done a good job. (Tr. 44). As a gang foreman, Claimant is required to climb stairs to the union hall in order to check-in for work. Since April 1999, Mr. Isbell has noticed that Claimant has had difficulty climbing stairways or walking up grades. (Tr. 45). However, prior to April 1999 Mr. Isbell did not notice Claimant having any difficulty climbing stairways or walking up grades. (Tr. 46). Mr. Isbell has noticed Claimant's difficulty in climbing up stairways or walking up grades recently worsen. From what Mr. Isbell has observed of Claimant, he believes Claimant would have difficulty performing the duties of a lasher or a rigger since those positions require climbing. (Tr. 46-47). He also believes Claimant would have difficulty performing the duties of a porter or a dock worker since both jobs are physically demanding. (Tr. 47).

On cross-examination, Mr. Isbell agreed that Claimant has a high level of seniority and acknowledged that ILA Local 24 members can choose which job they wish to fill based on their seniority level. (Tr. 48). According to Mr. Isbell, a flagman position could not be filled by Claimant because those positions are typically offered to ILA Local 24's dedicated workers, which are the union's newer workers that dedicate to one company. (Tr. 49). A hook-up job, however, could be filled by Claimant based on his level of seniority but pays half of what Claimant earns as a gang foreman. (Tr. 49-50). Mr. Isbell described the duties of a flagman as signaling a crane operator as to which way to maneuver the crane in order to safely get cargo in and out of the hatch. He described the duties of a hook-on as hooking gear onto cargo to move it from the hold of a vessel. (Tr. 53). Mr. Isbell stressed that normally hook-on jobs are not available at Barbour's Cut. Instead, Barbour's Cut typically has what is referred to as whip men whose responsibility it is to direct trucks into the proper spot and to attach or remove the automatic twist locks from containers. Whip men positions at Barbour's Cut are offered when such workers are needed. (Tr. 53). Since whip men are hired as needed they usually do not have the opportunity to take breaks during their work day as their assistance is usually required throughout the day. (Tr. 53-54).

Upon review of West Gulf Maritime Association's records regarding Claimant, Mr. Isbell acknowledged that for the period of December 24, 2004 through December 23, 2005 Claimant worked a

total of 1,530.25 hours with 726 of those hours as a gang foreman. (Tr. 50-51; CX-20, p. 20). In short, Claimant worked as a gang foreman for approximately half of the time period. (Tr. 51). Mr. Isbell also acknowledged that for the period of December 24, 2005 through March 9, 2006, Claimant worked a total of 286.50 hours with 211.50 of those hours as a gang foreman. (Tr. 51; CX-20, p. 37). During this time period Claimant worked mainly as a gang foreman. (Tr. 51-52). He further acknowledged that for the time period of April 16, 1998 through April 15, 1999, Claimant worked a total of 1,832.75 hours with 846.75 of those hours as a gang foreman. (Tr. 52; EX-163, p. 8). In this time period, Claimant worked a little less than half of his total compensable time as a gang foreman. (Tr. 52).

On re-direct examination, Mr. Isbell confirmed that flagmen and hook-on positions are dedicated jobs, which means that those positions are reserved for an ILA Local 24 member who has dedicated himself to an employer. When that employer has need of workers, the dedicated worker is required to work for that employer. (Tr. 55). Mr. Isbell also confirmed that Claimant would receive half or less than half of the pay he earns as a gang foreman if he were to choose to be a flagman or a hook-on worker. (Tr. 55-56). In addition, he acknowledged that an ILA Local 24 member cannot be both a gang foreman and a dedicated worker as well. (Tr. 55).

According to Mr. Isbell, Claimant's physical condition as he has observed it would not prevent Claimant from being offered employment as a dedicated worker. However, he acknowledged that in general, members with greater seniority are not likely to choose such positions. (Tr. 56). Mr. Isbell also acknowledged that the position of hook-on worker is very fast-paced, requires physical agility and does not, from what he has observed, allow an individual to sit down and work. (Tr. 56-58). In addition, Mr. Isbell acknowledged that the position of hook-on can be dangerous and stated that some employees have died while working as a hook-on. (Tr. 58).

Mr. Isbell reviewed Claimant's West Gulf Maritime Association records again for the periods of April 16, 1998 through April 15, 1999 and December 24, 2004 through December 23, 2005. He confirmed that for the period of April 16, 1998 through April 15, 1999, Claimant had fourteen (14) classifications of jobs which he could perform, whereas he only had eight (8) classifications of jobs for the period of December 24, 2004 through December 23, 2005. (Tr. 58-59; EX-163, p. 8; CX-20, p. 20). Some of the job classifications of which

Claimant no longer performed during the December 24, 2004 through December 23, 2005, period were porter, auto driver, crane operator, winch operator, and crane operator shipboard. (Tr. 59-60). According to Mr. Isbell, the position of auto driver requires a worker to walk up and down a ramp of a vessel to drive automobiles off the vessel. (Tr. 59). The positions of crane operator, winch operator, and crane operator shipboard all require a worker to climb up and down ladders and to sit for long periods. (Tr. 60).

Mr. Isbell also again reviewed Claimant's West Gulf Maritime Association records for the period of December 24, 2005 through March 9, 2006. (Tr. 60; CX-20, p. 37). Mr. Isbell acknowledged that should Claimant continue to work at the rate at which he was working during this period, he would work a total of approximately 1,144 hours for the year as opposed to the over 1,800 hours he earned prior to his April 1999 accident. (Tr. 60). In addition, according to Mr. Isbell, the wage rate for a longshoreman on a fully automated vessel in 1999 was $24.00 per hour, in 2000 was $25.00 per hour, in 2001 was $26.00 per hour, in 2002 was $27.00 per hour, and in 2004 was $28.00 per hour. (Tr. 61-62).

Oscar B. Suarez

Oscar B. Suarez is a sixty-three (63) year old longshoreman who works through ILA Local 24. He has worked as a longshoreman for approximately thirty-seven (37) years. (Tr. 64). In the approximate thirty-seven (37) years during which Mr. Suarez has worked as a longshoreman, he has performed almost every type of job on the waterfront, including driving a truck, tying cargo, releasing cargo, as well as driving and operating machinery. (Tr. 64-65). Currently, he works as a gang foreman for container vessels, a position he has held for approximately six (6) years. (Tr. 64-65). As for seniority within ILA Local 24, Mr. Suarez is one (1) section ahead of Claimant. (Tr. 67).

Mr. Suarez has known Claimant for approximately thirty-seven (37) to forty (40) years. (Tr. 65). He and Claimant worked together at a trucking company prior to both beginning work as longshoremen through ILA Local 24. (Tr. 65-66). He considers Claimant a friend and socializes with Claimant outside of work. (Tr. 66, 75). Mr. Suarez knows Claimant suffered injuries to his knees in the seventies and eighties. (Tr. 66). From 1998 up to April 1999, Mr. Suarez regularly worked with Claimant as a longshoreman. (Tr. 66-67). On occasions when Mr. Suarez was hired to work the same vessel as Claimant, Mr. Suarez

made a special effort to work as Claimant's partner. When either he or Claimant was chosen as gang foreman each would choose the other to be a member of his gang. (Tr. 67-68, 74).

During the time period of 1998 up to April 16, 1999, Claimant experienced pain in his knees when he worked with Mr. Suarez as a lasher or a rigger to such an extent that Mr. Suarez would help him with his work. (Tr. 68). As a rigger, Claimant was required to release containers aboard the vessel which required releasing lashing rods that were anywhere from eight (8) to twenty (20) feet long and quite heavy and placing them in a hallway. (Tr. 68-69, 73). According to Mr. Suarez, Claimant was able to do most of his work on his own despite his knee pain. (Tr. 68-69). Besides experiencing pain in his knees while working during the period of 1998 up to April 16, 1999, Mr. Suarez noticed Claimant also had difficulty walking a gangway or climbing a ladder since Claimant always held onto something while walking or climbing. (Tr. 69).

Following Claimant's return to work after his April 16, 1999 injury up through 2006, he noticed Claimant had difficulty lifting lashing rods, difficulty walking among lashing rods, and was unable to release some lashing rods due to their size. (Tr. 70). Mr. Suarez also noticed Claimant had difficulty with bending down to retrieve turnbuckles in order to place them in another location. (Tr. 73-74). Since Claimant's April 1999 injury, he also noticed Claimant has difficulty walking and complains of knee pain when he climbs ladders. (Tr. 70-71). When Claimant complains of knee pain he does not specify a single knee, right knee or left knee, as causing him pain; rather, he simply complains of knee pain. (Tr. 71). In addition, Mr. Suarez noticed Claimant pass on some jobs that he would have accepted prior to his April 1999 injury, specifically, jobs that involve releasing a lot of lashing rods, jobs involving work on double rigs, or "under the whip" jobs. (Tr. 71-72). Mr. Suarez theorized Claimant passed on jobs under the whip because such jobs require a great deal of standing which he believes Claimant's knees cannot handle. (Tr. 72).

Mr. Suarez found himself, following Claimant's April 1999 injury, helping Claimant complete his work by assisting Claimant in releasing lashing rods as well as assisting him with work on double rigs, and placing lashing rods in another location. (Tr. 72). When Mr. Suarez is assigned a radio as a gang foreman, he gives the radio to Claimant in order to free himself up to complete Claimant's work for him. (Tr. 72-74). He agreed that relinquishing the radioman position to Claimant creates more

work for him but he considers it a pleasure to help his friend. (Tr. 74-75). In Mr. Suarez's opinion, Claimant could not work as many days as he has as a longshoreman following his April 1999 injury without Mr. Suarez's assistance. According to Mr. Suarez, Claimant suffers the same pain and difficulty with his knees at home as he does at work. (Tr. 75).

Mr. Suarez reviewed a summary of his work hours compiled by ILA Local 24 and confirmed that with the passing of every year he moved up a section in seniority. (Tr. 75-76; CX-25, p. 2). Each additional level of seniority gives an ILA Local 24 member, such as Mr. Suarez, better job opportunities from which to choose. Since Mr. Suarez has reached Section 36 in seniority, he is able to work everyday of the week if he so chooses. If he does not work on any one day that is because he chooses not to work. If he wanted to increase his hours and his wages, he could do so based on his seniority. (Tr. 76).

On cross-examination, Mr. Suarez confirmed he is friends with Claimant and that he was testifying in order to help Claimant. (Tr. 76-77). He denied, however, that Claimant coached his testimony. (Tr. 77-78). Although Mr. Suarez acknowledged that he was testifying regarding Claimant's April 16, 1999 injury, he confirmed he did not witness the accident that gave rise to Claimant's injury. (Tr. 78). He also confirmed that in approximately 2002, he began to help Claimant with his work because of Claimant's knee problems. (Tr. 78-79). Again, Claimant complained to Mr. Suarez of knee problems, but did not specify a particular knee as the cause of the problems. (Tr. 79).

Mr. Suarez reviewed a summary of Claimant's work hours compiled by ILA Local 24 and confirmed that Claimant worked a total of 1,752 hours in 2002, 1,879 hours in 2003 and 1,900 hours in 2004. (Tr. 79-80; CX-25, p. 3). He acknowledged that although he observed Claimant to suffer from knee problems which interfered with his ability to work as early as approximately 2002, Claimant's hours increased in each progressive year despite his knee problems. (Tr. 80-81). Mr. Suarez stressed that although Claimant's hours increased they were not as great as the hours Mr. Suarez himself worked. (Tr. 80). He acknowledged, however, that he does not suffer from knee problems and that he and Claimant's life circumstances are different. (Tr. 81). Mr. Suarez agreed he has regularly worked more hours than Claimant, possibly because he does not suffer from the same medical problems as Claimant. (Tr. 81-82).

On re-direct examination, Mr. Suarez confirmed Claimant's Counsel subpoenaed him to testify. (Tr. 82-83). According to Mr. Suarez, he would not lie to help Claimant. He also confirmed that while he noticed Claimant's knee problems interfering with his ability to work as early as 2002, he noticed Claimant's knee problems progressively worsen each year thereafter. In addition, Mr. Suarez acknowledged that as of the date of hearing he had worked 1,400 hours. (Tr. 83).

Claimant

Claimant is a sixty-five (65) year old male with a tenth grade education who presently resides in Houston, Texas. He currently works as a longshoreman through ILA Local 24. Claimant has worked as a longshoreman for approximately thirty-six (36) years. (Tr. 85). According to Claimant, a longshoreman with ILA Local 24 must have worked 700 hours in order to move up in seniority, 1,000 hours in order to earn "the big check" and 1,300 hours in order to qualify for insurance. Originally, however, a longshoreman with ILA Local 24 had to work 1,200 hours in order to move up in seniority. (Tr. 86).

On Friday, April 16, 1999, Claimant was working as a rigger aboard a vessel. (Tr. 86, 89). Sometime that afternoon, he attempted to remove some lashing rods that were lying between two hatches. (Tr. 86, 88). While attempting to remove the lashing rods, Claimant slipped and landed on his knees, injuring both knees and his left ankle. (Tr. 86-87). After he slipped, he experienced sharp pains in his knees and pain in his ankle. According to Claimant, prior to reporting for work on April 16, 1999, he was not experiencing sharp pains in his knees or pain in his ankle. (Tr. 87). Claimant stated a co-worker, Amos Gutierrez, witnessed his April 16, 1999 fall. Employer/Carrier, however, did not obtain a statement from Mr. Gutierrez regarding Claimant's accident at that time. Mr. Gutierrez has since passed away. (Tr. 88).

Claimant reported his April 16, 1999 fall to a walking foreman and his foreman that same day. (Tr. 87, 89-90). A notation regarding Claimant's accident was made by a timekeeper on Claimant's time-slip. (Tr. 89-90). However, Claimant did not request medical treatment for his injuries on that day. (Tr. 87). Instead, he sat down on a walkway aboard the vessel for about an hour in an attempt to ease his pain. (Tr. 87-88). After which, Claimant finished his work for the day, went home, took a shower, and placed hot water on his knees as they were still causing him pain. (Tr. 88-89). Claimant's knees

continued to cause him pain throughout the weekend, prompting him to restrict his activities. He basically stayed confined to his house the entire weekend. Consequently, upon his return to work on Monday, Claimant requested medical treatment for his knees. (Tr. 89).

According to Claimant, he approached one of Employer/Carrier's superintendents and requested permission to see a physician. (Tr. 89-90). The superintendent gave Claimant permission to see a physician. (Tr. 90-91). Claimant reviewed a copy of a Report and Verification of Accident prepared by one of Employer's superintendents and signed by Claimant. (Tr. 91, 152; EX-1, p. 1). Claimant told the superintendent he injured his right and left knees and left ankle while working on April 16, 1999. (Tr. 91-92, 153). Although Claimant told the superintendent he injured both of his knees, the superintendent summarized Claimant's injuries in the Report and Verification of Accident as sprained or strained left leg and knee. (Tr. 92, 153; EX-1, p. 1). However, in the same report the superintendent also indicated by checking boxes that Claimant had injured the right and left side of his body. (Tr. 92-93, 153; EX-1, p. 1). Claimant insists he did not read the completed Report and Verification of Accident. Instead, Claimant "took for granted" that the superintendent summarized his injuries as he had described them to him and signed the Report without reading it. (Tr. 93, 153-154).

Claimant reviewed a copy of a Request for Examination and/or Treatment regarding his request to see a physician. In this Request for Examination, Claimant's accident and injuries are summarized as: "Man slipped on uneven deck surface, spraining-straining left leg, right leg also sore." (Tr. 93; EX-2, p. 1). Following the issuance of the Request for Examination, Claimant met with Dr. Abiel Garcia to whom he presented with complaints of pain in his left and right knee as well as pain in his left ankle. (Tr. 93-94). Claimant informed Dr. Garcia that he had suffered previous knee injuries. (Tr. 95). Dr. Garcia restricted Claimant from working and prescribed a course of treatment of medication and physical therapy. (Tr. 94, 101). Claimant treated with Dr. Garcia for approximately three (3) to four (4) weeks. (Tr. 94). The treatment prescribed by Dr. Garcia helped to somewhat alleviate Claimant's pain. (Tr. 95). According to Claimant, at no point during his treatment with Dr. Garcia was he contacted by Employer/Carrier to dispute whether or not he suffered a work-related injury. (Tr. 94-95).

Besides treating Claimant with a course of medication and physical therapy, Dr. Garcia also recommended Claimant consult with an orthopaedic specialist. (Tr. 95). Originally, Claimant requested authorization to see Dr. Frank L. Barnes, who had previously treated knee injuries he had suffered. (Tr. 95-96). However, an appointment with Dr. Barnes could not be secured. (Tr. 95). Dr. Barnes last treated Claimant in 1997 after Claimant suffered a work-place injury to his right knee on July 29, 1997. Dr. Barnes prescribed Claimant medication for his knee injury and eventually released him back to work. (Tr. 96). After returning to work, Claimant's knee continued to "bother" him a bit. Nevertheless, Claimant was able to perform all duties required of him as a longshoreman and as a gang foreman. After his return to work in 1997 and up to April 16, 1999, none of Claimant's knee problems or pain prevented him from completing any of his longshore work. (Tr. 97). However, after his accident on April 16, 1999, Claimant experienced a greater degree of pain than he had ever experienced before April 1999. (Tr. 97-98).

Since an appointment with Dr. Barnes could not be obtained, Claimant met with Dr. Bruce R. Weiner. Claimant told Dr. Weiner he injured his right and left knees as well as his left ankle. (Tr. 98). Claimant also informed Dr. Weiner of his previous knee injuries and surgeries. (Tr. 102-103). Although Claimant informed Dr. Weiner of his previous knee injuries and surgeries, Dr. Weiner did not inquire further of Claimant as to his previous knee problems, including inquiring as to course of treatment, type of surgery, whether the problem affected Claimant's ability to work, or the state of Claimant's knees prior to his April 1999 accident. (Tr. 103-104). Ultimately, Dr. Weiner treated Claimant with Cortisone injections and medication. (Tr. 98-99). Dr. Weiner administered Cortisone injections into Claimant's right and left knees. However, he focused most of his treatment on Claimant's left knee and ankle. (Tr. 98-99). During his treatment of Claimant, Dr. Weiner did not restrict Claimant from working. (Tr. 101). While undergoing treatment with Dr. Weiner, Claimant requested authorization to see other physicians regarding his ankle and knees. Following an informal conference at the Department of Labor concerning these requests, Claimant was permitted to see Dr. W. Grant Braly regarding his ankle. (Tr. 99).

Initially, Dr. Braly treated Claimant's ankle injury with medication and an ankle brace. Eventually, however, Dr. Braly performed an operation on Claimant's ankle. (Tr. 100). Claimant was restricted from working at that time. (Tr. 100-

101). Following the surgery, Dr. Braly provided Claimant with "special" shoes and some medication. (Tr. 101). Dr. Braly did not assign a permanent impairment rating to Claimant's ankle. (Tr. 127). Dr. Braly did, however, release Claimant to return to work. (Tr. 101-102).

Claimant returned to work following his ankle surgery but still experienced some pain in his foot. (Tr. 102). Claimant also continued to experience pain in his knees. Consequently, Claimant tried to avoid working under the whip because such work required walking in addition to standing for long periods of time. He also tried to avoid working automobiles because of all the walking up and down ramps that have no railings, only a rope. (Tr. 105-107). Prior to his April 1999 accident, Claimant was able to work automobiles. (Tr. 106). However, after his April 1999 accident and his subsequent release to work following his ankle surgery, Claimant limited himself to accepting lashing work, rigging work, and work as a gang foreman. (Tr. 107).

On March 2, 2000, Claimant returned to Dr. Weiner complaining of knee pain. (Tr. 102; JX-4, p. 21). According to Claimant, Dr. Weiner was upset with him for having had a MRI and for having undergone surgery on his ankle. Dr. Weiner told Claimant he believed he could have made him well through Cortisone injections and that Claimant did not have to see him any longer. As a result, Claimant understood Dr. Weiner to have released him from his care on March 2, 2000. (Tr. 102).

In November 1999, Claimant requested authorization to see either Dr. William Bryan or Dr. Bruce Mosley regarding his knees. Authorization was denied. (Tr. 104). However, in 2004 Claimant obtained authorization from Employer/Carrier to see Dr. Bryan. (Tr. 111-112). Claimant told Dr. Bryan he injured both of his knees and his left ankle. Dr. Bryan administered Depomedrol and Lidocaine injections into Claimant's knees and prescribed Claimant a pain killer as well as an anti-inflammatory medication. (Tr. 112-113; JX-2, p. 15). Dr. Bryan suggested Claimant undergo a series of bilateral knee viscous supplementations. (Tr. 113; JX-2, p. 15). Employer/Carrier, however, refused to authorize the treatment.

On September 3, 2004, Claimant met again with Dr. Bryan who determined Claimant was in need of bilateral total knee replacements but that Workers' Compensation would only cover replacement of the left knee. (Tr. 113; JX-2, p. 16). According to Claimant, he told Dr. Bryan that he injured both of

his knees on April 16, 1999. Claimant acknowledged, however, that Employer/Carrier did not authorize Dr. Bryan to treat his right knee. (Tr. 113-114). A surgery appointment was scheduled for Claimant to undergo surgery to his left knee. This surgical appointment, though, was eventually cancelled after Claimant discovered Employer/Carrier had refused to pay for the procedure. (Tr. 114).

On March 9, 2005, Claimant met with Dr. Gary Freeman at Employer/Carrier's request. (Tr. 114-115). He informed Dr. Freeman that he had injured both his knees and his ankle in a fall. Dr. Freeman noticed scars on Claimant's knees and told him they looked "messed up." Claimant told Dr. Freeman he had previously injured his knees three (3) or four (4) times. During his appointment with Claimant, Dr. Freeman never touched Claimant's knees, never inquired into Claimant's surgical history regarding previous surgeries on his knees, nor did he ask Claimant about any sort of work limitations brought about by his injuries. (Tr. 115-116). Dr. Freeman also did not offer any sort of treatment for Claimant's injuries. (Tr. 116).

On June 7, 2005, Claimant met with Dr. Cecil Christensen at the Department of Labor's request. (Tr. 116; CX-8, p. 3). Dr. Christensen examined Claimant's knees and also obtained x-rays. (Tr. 116; CX-8, p. 4). After examining Claimant, Dr. Christensen told Claimant he would eventually need some sort of operation. (Tr. 117).

Since mid-2001, Claimant has tried to increase his work as a gang foreman since gang foreman work is not as physically demanding as lashing or rigging work. (Tr. 107-108). He was able to increase his work as a gang foreman by working higher paying shifts. According to Claimant, gang foremen with ILA Local 24 who earn more money are able to work more frequently as gang foremen than foremen in the regular rotation because of their higher earnings. (Tr. 108-110). Although Claimant has tried to limit himself to work as a gang foreman, his pay records indicate that he worked on among other things the dock, the vessel, the deck, and lashing. (Tr. 110; CX-20, pp. 1-37). Claimant stated his work as a gang foreman is recorded as work that his gang performed. If his gang performs lashing work, then his work for that day is recorded as lashing. (Tr. 110-111).

According to Claimant, his knees have progressively worsened since his return to work in 2001. He reviewed a summary of his work hours from 2001 to 2004 compiled by ILA

Local 24 and confirmed he worked 1,796 hours in 2001, 1,752 hours in 2002, 1,879 hours in 2003, and 1,900 hours in 2004. (Tr. 117; CX-25, p. 3). Claimant stated he was able to work those hours by choosing his jobs and had he not had problems with his knees he would have worked more. (Tr. 117-118). In addition, Claimant stated he chose not to work on some days as he felt he could not perform the duties required of him on certain vessels because of his knee problems. (Tr. 118). In particular, he chose not to work on days when he would have had to work on a vessel with double rigging or when he would have had to break down more than one (1) hatch. (Tr. 118-119). According to Claimant, his knees "give out" and he experiences sharp pain when he tries to perform the duties required of him on vessels with double rigging or breaking down of more than one (1) hatch. Claimant stated he also fears falling through a hatch or off the side of the main deck should his knees give out while he is trying to release and remove lashing rods. (Tr. 119). One to two-high lashing rods, according to Claimant, weigh between sixty (60) to seventy-five (75) pounds, while three-high lashing rods weigh between eighty (80) to ninety-eight (98) pounds. (Tr. 119-120).

Claimant stated since he returned to work in 2001, he has not requested assistance in completing his job requirements from Mr. Suarez. However, he acknowledged that as a friend Mr. Suarez knows Claimant cannot perform some requirements so he completes those requirements for Claimant. According to Claimant, he did not need any assistance from Mr. Suarez prior to his April 16, 1999 accident. (Tr. 120). Claimant again reviewed a summary of his work hours from ILA Local 24 and confirmed he worked 1,679 hours in 2005. Claimant also reviewed a summary of his work hours compiled by West Gulf Maritime Association and confirmed he was recorded as working 1,530 hours from December 2004 to December 2005 and 286.5 hours from December 24, 2005 to March 9, 2006. (Tr. 120-121; CX-25, p. 3; CX-20, p. 36). He stated he has worked less hours in 2005 and 2006 because of increased pain in his knees. (Tr. 120-121).

According to Claimant, the pain in his knees has gotten so bad he cannot sleep at night. (Tr. 121, 125-126). Besides having difficulties sleeping, Claimant is currently unable to mow his lawn, wash his car, or participate in any activity that requires he stand more than fifteen (15) to twenty (20) minutes at a time. (Tr. 125-126). He also stated he no longer receives medication to help relieve the pain and that without medication

it is hard for him to work. (Tr. 121). Consequently, Claimant is seeking medical benefits, including bilateral total knee replacement, as well as lost wages from 2005 to 2006 from Employer/Carrier. (Tr. 126).

Upon further review of his work hours compiled by West Gulf Maritime Association, Claimant confirmed that of the 286.5 hours he worked from December 24, 2005 to March 9, 2006, 211.5 of those hours were for work as a gang foreman. According to Claimant, the rest of the hours worked from December 24, 2005 to March 9, 2006, were for work as a rigger. (Tr. 122; CX-20, p. 36). Prior to 1999 he was able to work as a porter. Currently, however, Claimant is unable to work as a porter due to all of the heavy lifting required of a porter. (Tr. 122). Claimant stated he is also currently physically unable to work under the whip, work automobiles, or work as a hook-on. (Tr. 122-124). In addition, he stated he is physically capable of working as a flagman but would not be able to obtain work as a flagman because of his seniority. (Tr. 122-123). According to Claimant, flagman positions are offered to ILA Local 24 members in seniority Sections forty-five (45) to forty-seven (47). (Tr. 123).

Prior to 1999, Claimant stated he experienced pain of about five (5) on a scale of one (1) to ten (10) in his left knee and five (5) to six (6) in his right knee. (Tr. 124-125). During 2002 to 2004, his pain increased to about eight (8), while in 2006 his pain increased to about a nine (9). (Tr. 125). In Claimant's opinion, the injuries he received on April 16, 1999, permanently changed the condition of his knees by worsening his condition. (Tr. 126).

On cross-examination, Claimant stated his first injuries to his knees occurred in either the seventies or eighties. According to Claimant, he previously underwent surgery approximately three (3) or four (4) times on each knee. (Tr. 130). Claimant reviewed a report prepared by Dr. John Andrew dated May 9, 1991. He agreed that Dr. Andrew's summary of his previous surgeries, namely, surgery on his left knee in 1977, surgery on his right knee in 1979, and surgery on his left knee in 1980, were accurate. (Tr. 130-131). Claimant could not recall injuring his knee on December 7, 1981, but agreed he had no basis to dispute a letter from Dr. Bryan regarding such injury. (Tr. 131-132). He could also not recall filing a claim regarding that injury, however, he acknowledged he filed claims for injuries that resulted from work-related accidents, but could not recall which injuries in particular. (Tr. 132).

Claimant reviewed a Notice of Final Payment or Suspension of Compensation Payments regarding a December 7, 1981 injury to his left knee and confirmed that the Notice lists a permanent partial disability impairment rating of 10% to his left knee. (Tr. 133-134; EX-40, p. 1). Claimant could not recall having surgery on his left knee in 1982, but agreed he had no basis to dispute a report prepared by Dr. Barnes regarding surgery on his left knee. (Tr. 134). He returned to work on June 3, 1982, following the surgery on his left knee. (Tr. 135).

Claimant confirmed he had no reason to dispute a court document which indicated after his return to work on June 3, 1982, he injured his left knee again on June 5, 1982. (Tr. 135). Claimant could not recall undergoing surgery on his knee following this injury, but agreed he had no basis to dispute a letter from Dr. Thomas Cain which indicated he underwent surgery to his left knee on May 5, 1983. (Tr. 135-136). He acknowledged he also had no basis to dispute a letter from Dr. Cain dated February 6, 1985, which indicated Claimant informed Dr. Cain his left knee continued to "give way" and that following some tests, Dr. Cain noted osteoarthritic changes in both Claimant's knees. (Tr. 136-137). In addition, Claimant acknowledged he had no basis to dispute a report prepared by Dr. Andrew dated March 14, 1985, wherein Dr. Andrew noted significant degenerative changes in Claimant's left knee and assigned a permanent partial disability impairment rating of 15% to his left knee. (Tr. 137). Claimant next reviewed a Notice of Final Payment or Suspension of Compensation Payments regarding a June 5, 1982, injury to his left knee and confirmed that the Notice listed a permanent partial disability impairment rating of 10% to his left knee. (Tr. 137-138). As a result of Claimant's December 7, 1981 and June 5, 1982 knee injuries, an Administrative Law Judge found Claimant to have a 20% permanent impairment rating based on the combination of those injuries. The Administrative Law Judge's finding was affirmed on appeal. (Tr. 142-143; EX-27, p. 3; EX-29, pp. 6-7).

Besides not being able to recall injuring his left knee on December 7, 1981, and on June 5, 1982, Claimant could also not recall injuring his right knee on November 13, 1986. Claimant agreed, however, he had no basis to dispute a report from Dr. Barnes dated December 5, 1986, wherein Dr. Barnes stated Claimant injured his right knee on November 13, 1986, when he slipped on some oil dripping from a port winch. Claimant also did not dispute that Dr. Barnes had obtained x-rays of his knee and had noted degenerative changes in his knee. (Tr. 138). He

could also not recall injuring his right knee in 1988, but he did not dispute the accuracy of a letter from Dr. Cain dated October 26, 1988, indicating he had injured his right knee six weeks earlier while moving some hay bales. Dr. Cain also noted degenerative changes and joint disease in both Claimant's knees and stated Claimant would probably reach a point where he could no longer work as a longshoreman. Dr. Cain further noted Claimant might be a candidate for knee replacement in five (5) to ten (10) years. (Tr. 139). Claimant stated as far as he could recall, Dr. Cain did not inform him that, in the future, he might be a candidate for knee replacement. (Tr. 140).

In addition to not being able to recall the 1981, 1982, 1986 and 1988 injuries to his knees, he could not recall injuring his knees on February 29, 1991, after falling into an opening in a hatch cover. (Tr. 143). Claimant agreed, however, he had no basis for disputing statements to such an effect in a report dated May 9, 1991, from Dr. Andrew. (Tr. 143-144). Claimant also agreed he had no basis to dispute statements in Dr. Andrew's report indicating Dr. Andrew noted old, longstanding degenerative changes in Claimant's right knee and pre-existing degenerative changes in both knees secondary to multiple surgeries. In addition, he agreed he had no basis to dispute statements in a letter dated November 14, 1991, from Dr. Barnes wherein Dr. Barnes indicated Claimant had post-traumatic arthritis of both knees and would eventually need total knee replacement if his situation worsened. (Tr. 144). Claimant next reviewed a Notice of Final Payment or Suspension of Compensation Payments regarding his February 28, 1991 knee injury and confirmed he received a $17,000 permanent partial disability settlement. (Tr. 146-147).

Claimant reviewed a letter dated September 28, 1992, from Dr. Barnes wherein Dr. Barnes stated Claimant received four (4) settlements regarding his knees, two (2) of which assigned a 10% impairment to his left leg and two (2) of which assigned a 25% impairment to his right leg. He acknowledged he had no basis on which to dispute these statements. (Tr. 145). Dr. Barnes determined Claimant suffered a 21% impairment rating to his right leg and 20% impairment to his left leg following his February 1991 accident, which reflected at least a 10% increase in Claimant's impairment rating of his left leg. (Tr. 145-146). Claimant agreed he also had no basis to dispute the statements in Dr. Barnes' letter. (Tr. 146).

Besides being unable to recall the 1981, 1982, 1986, 1988, and 1991 injuries to his knees, Claimant also could not recall undergoing surgery to his left knee on October 3, 1993. Claimant acknowledged, however, he had no basis to dispute a letter dated October 13, 1993, from Dr. Barnes indicating Claimant underwent arthroscopic surgery of his left knee on October 3, 1993, and was found to suffer from rather advanced osteoarthritis. (Tr. 146).

Prior to 1999, Claimant could only recall Dr. Barnes as possibly having informed him in 1997 that he might be a candidate for knee replacement. (Tr. 140-141). He could not recall, however, Dr. Barnes telling him he would need bilateral knee replacement. He could recall, though, that Dr. Barnes was treating him for an injury to his right knee at that time. (Tr. 141). Claimant injured his right knee on July 29, 1997, when he was working aboard a vessel. (Tr. 147). He recalled receiving medication for treatment of this knee injury. (Tr. 147-148). Claimant initially saw Dr. Garcia who obtained an x-ray of Claimant's knee and noted Claimant suffered from advanced osteoarthritis. Dr. Garcia then referred Claimant to Dr. Barnes. (Tr. 148). Dr. Barnes issued a report on January 20, 1998, wherein he determined Claimant's anticipated length of continued disability as to his right knee was permanent. (Tr. 148-149).

In sum, Claimant acknowledged based on his medical records he has injured his left knee at least three (3) times and has had surgery on his left knee at least five (5) times. (Tr. 149). He also acknowledged that based on his medical records he has injured his right knee at least four (4) times and has had surgery on his right knee at least one (1) time. (Tr. 149-150). Although Claimant's medical records indicate Claimant had one (1) surgery on his right knee, Claimant recalled undergoing three (3) or four (4) surgeries on his right knee. (Tr. 150, 166-167). Claimant additionally acknowledged based on his medical records he received a 25% impairment rating to his right leg following a March 14, 1975 accident, a 10% permanent partial impairment rating to his left leg following a December 7, 1981 accident, a 10% impairment rating to his left leg following a June 5, 1982 accident, and a 25% impairment rating to his right leg following a September 25, 1987 accident. (Tr. 151-152).

According to Claimant, his co-worker Mr. Gutierrez witnessed his April 16, 1999 accident. (Tr. 154-155). Claimant acknowledged he testified in his deposition that there was no

witness to his April 16, 1999 accident, but suggested that due to his hearing difficulties he might have misunderstood the question at his deposition. (Tr. 155-156, 161; EX-26, p. 57). He further acknowledged that no witnesses were listed on his Report and Verification of Accident form. (Tr. 156). Claimant stated he told the individual completing the form about Mr. Gutierrez and suggested he left Mr. Gutierrez's name off the Report and Verification of Accident by mistake. (Tr. 157, 160-161). Claimant theorized that the individual completing the Report and Verification of Accident simply did not follow procedure when he filled out the Report since he also did not follow procedure when he told Claimant he would not have to submit to a drug test as ordinarily required. (Tr. 157-158).

Claimant confirmed Dr. Garcia was the first physician he saw following his April 16, 1999 accident. (Tr. 161). According to Claimant, Dr. Garcia prescribed medication and physical therapy for treatment of his knees and left ankle. (Tr. 161-162). He stated he was not denied treatment for his right knee, left knee or left ankle during the time he was under Dr. Garcia's care. (Tr. 162). Claimant also confirmed when he initially saw Dr. Weiner for treatment on referral from Employer/Carrier, Dr. Weiner administered injections into both Claimant's knees after which he focused on treating Claimant's ankle. (Tr. 162-163, 167-168, 173). Claimant further confirmed Dr. Braly whom he saw after Dr. Weiner only treated his ankle injury and not his knee injuries. (Tr. 163-163). In all, Claimant only received treatment for his right knee from Drs. Garcia, Weiner, and Bryan who, like Dr. Weiner, administered an injection into Claimant's right knee. (Tr. 164-166).

When Claimant returned to Dr. Weiner for treatment following his ankle surgery with Dr. Braly, Claimant believed Dr. Weiner was angry with him for having received treatment for his ankle from Dr. Braly. (Tr. 168-169). Claimant stated he was unaware of the opinions reached by Dr. Weiner concerning his condition. (Tr. 169). In his initial medical report regarding Claimant, Dr. Weiner concluded Claimant had severe problems with both knees for years, had multiple surgeries on both knees, that his knees would occasionally swell and give way prior to his April 16, 1999 accident, and in the future he would need total knee replacements because of his pre-existing condition. (Tr. 169-170). Dr. Weiner stated later in response to an April 24, 2006 questionnaire from Employer/Carrier that, after reviewing Claimant's subsequent medical records, his opinion regarding Claimant's need for bilateral total knee replacement due to his pre-existing condition remained unchanged. (Tr. 170-171). Dr.

Weiner concluded in all medical probability Claimant's knees would be the same whether or not he suffered an injury to his knees on April 16, 1999. (Tr. 171-172). Dr. Weiner also concluded Claimant reached maximum medical improvement on October 16, 1999, and that Employer/Carrier had no further responsibility to provide medical benefits since any additional treatment would be for Claimant's pre-existing condition. (Tr. 172-173).

Claimant confirmed that when he met with Dr. Freeman for an examination, Dr. Freeman did nothing more than visually observe the scars on his knees during his examination of Claimant. (Tr. 173-175). Claimant informed Dr. Freeman that he had undergone previous surgeries on his knees. (Tr. 175). Claimant acknowledged Dr. Freeman concluded that Claimant's April 16, 1999 accident did not exacerbate Claimant's pre-existing degenerative changes in his knees. Dr. Freeman also attributed minimal credibility to Claimant's April 16, 1999 accident contributing to Claimant's need for total knee replacement and was of the opinion that Claimant's condition would be the same regardless of his April 16, 1999 accident. (Tr. 176).

Claimant reviewed a copy of a report dated January 26, 2006, prepared by Dr. Christensen wherein Dr. Christensen indicated Claimant suffered from osteoarthritis which might have been exacerbated by his April 16, 1999 accident. (Tr. 176). Claimant stated during direct examination that his knee problems did not affect his ability to work prior to April 16, 1999. He acknowledged, however, that during his deposition he stated that his knee problems somewhat affected his ability to work prior to April 16, 1999. (Tr. 177; EX-26, p. 47). Claimant conceded that his knee problems did somewhat affect his ability to work prior to April 16, 1999. (Tr. 177-178).

Claimant next reviewed a copy of his work hours compiled by West Gulf Maritime Association for the period of April 16, 1998 to April 15, 1999. (Tr. 179; EX-163, p. 2). Claimant confirmed he worked a total of 1,832.75 hours during that period with 846.75 hours as a gang foreman. (Tr. 180). Claimant agreed that it appeared based on his work history that he worked 46% of his time during that period as a gang foreman. (Tr. 180-181). Claimant then reviewed his work hours compiled by West Gulf Maritime Association for the period of April 16, 1999 to February 28, 2006. (Tr. 181; EX-156, p. 28). Claimant

confirmed he worked a total of 11,299.50 hours during that period with 4,936 hours as a gang foreman. Claimant agreed that it appeared based on his work history that he worked 44% of his time during that period as a gang foreman. (Tr. 182).

Claimant acknowledged he has property in Summerville where he goes twice a week during the winter to feed his livestock. (Tr. 182-185). During other times of the year, Claimant stated he goes to Summerville once a week. (Tr. 185).

On re-direct examination, Claimant confirmed that Drs. Barnes and Cain were his treating physicians for his past injuries. (Tr. 185). He stated Dr. Andrew was a physician to whom he was sent by Employer/Carrier. Claimant also stated Dr. Weiner was not one of his treating physicians and that Dr. Weiner has a reputation of being a company physician. (Tr. 186). Claimant would rather have not been seen by Dr. Weiner because of Dr. Weiner's reputation of being a company physician. (Tr. 186-187). Claimant reviewed a report dated May 27, 1999, prepared by Dr. Weiner wherein Dr. Weiner stated Claimant injured both his knees as well as his left ankle when he slipped and fell while working aboard a vessel. Dr. Weiner also stated in the report that he had injected both Claimant's knees with Xylocaine and Cortisone and that in the future Claimant might need total knee replacement because of pre-existing conditions. (Tr. 187; JX-4, p. 25). Claimant confirmed he told Dr. Weiner he injured both knees when he slipped and fell on April 16, 1999. (Tr. 187). Claimant also confirmed Dr. Weiner administered injections into both his knees. (Tr. 187-188).

According to Claimant, after Dr. Weiner administered injections into his knees, he focused his treatment of Claimant on Claimant's ankle. (Tr. 188). During his last appointment with Dr. Weiner on March 2, 2000, Claimant stated Dr. Weiner told him he did not have to see him anymore. (Tr. 188-189). Claimant stated after Dr. Weiner told him he did not have to see him anymore, Dr. Weiner made no offer of continuing treatment for his knees or ankle. (Tr. 189).

Claimant stated that when he testified that his knee problems somewhat affected his ability to work prior to April 16, 1999, he meant that his knee problems made it more difficult to perform more physically demanding aspects of his work as a longshoreman. (Tr. 189-191). Claimant also stated that his ability to work on his Summerville property has decreased following his April 16, 1999 accident. (Tr. 191). Claimant can no longer drive his tractor because of some missing springs, fix

any fencing on the property, cut the grass, or dispose of any fallen trees himself. According to Claimant, since his April 16, 1999 accident he has had to pay someone to do all that work for him. (Tr. 191-192).

On recross-examination, Claimant confirmed he testified during his direct and cross-examinations that there was a witness to his April 16, 1999 accident. (Tr. 194). Claimant, however, could not recall providing a statement to Employer/Carrier on April 21, 1999, wherein he stated there were no witnesses to his April 16, 1999 accident. (Tr. 194-197; EX-170, p. 6). However, Claimant agreed he had no basis to dispute the contents of the statement. (Tr. 196). According to Claimant, what he meant when he said there were no witnesses to his April 16, 1999 accident was that when he slipped and fell on the deck Mr. Gutierrez was down in the hold. When Mr. Gutierrez reached the deck, he saw Claimant in pain and asked what had happened. In other words, Mr. Gutierrez did not actually see Claimant fall; rather, Claimant told Mr. Gutierrez he had hurt himself in a slip and fall. (Tr. 198-199).

The Evidence Regarding Prior Injuries

Claimant injured his right knee on March 14, 1975. A permanent partial disability rating of 25% was assigned to his knee at that time and he received a compensation award based on that rating. On December 7, 1981, Claimant injured his left knee. A permanent partial disability rating of 10% was assigned to his left knee and he received a compensation award based on that rating. On June 5, 1982, Claimant re-injured his left knee. (EX-28, p. 1). Dr. Barnes assigned an impairment rating of 40% to Claimant's left knee. He attributed 10% of the 40% disability rating to Claimant's December 1981 injury and the remaining 30% to Claimant's re-injury of his left knee in June 1982. (EX-59, p. 1). Dr. Cain, on the other hand, assigned an impairment rating of 20% to Claimant's left knee based on both his December 1981 and June 1982 injuries, (EX-29, p. 3; EX-73, p. 2), while Dr. Andrew assigned an impairment rating of 15% to Claimant's left leg. (EX-29, p. 4; EX-74, p. 3). Claimant received a compensation award based on an impairment rating of 10% as determined to be attributable to Claimant's June 1982 injury by Dr. Cain. (EX-28, p. 1; EX-29, pp. 6-7).

On November 13, 1986, Claimant again injured his right knee. (EX-80, p. 1).[3] Claimant received an award of compensation for this injury through a Section 8(i) settlement. (Ex-79, p. 1). On September 25, 1987, Claimant again injured his right knee. A permanent partial disability rating of 25% was assigned to his knee and he received a compensation award based on that rating. (EX-28, p. 1).

Claimant injured both his knees on February 28, 1991. (EX-86, p. 1). Dr. Andrew determined Claimant suffered no permanent disability as a result of his February 28, 1991 injury as he concluded the injury did not accelerate or alter the degenerative changes in Claimant's knees. (EX-123, p. 2). Dr. Cain concluded Claimant's February 1991 injury aggravated his degenerative condition by causing synovitis. However, he determined once Claimant's synovitis was controlled, Claimant's disability would not increase as a result of the February 1991 injury. (EX-124, p. 3). On June 8, 1992, Dr. Barnes assigned a permanent partial disability rating of 20% to both Claimant's legs. He attributed 15% of the 20% disability rating to Claimant's pre-existing degenerative condition and the remaining 5% to Claimant's February 1991 injury. (EX-126, p. 1). On September 28, 1992, Dr. Barnes assigned a 20% impairment rating to Claimant's left leg and a 21% impairment rating to Claimant's right leg. Dr. Barnes noted his assignment of a 20% impairment rating to Claimant's left leg represented a 10% increase in Claimant's disability rating for that leg. (EX-128, p. 1). Claimant received an award of compensation for this injury through a Section 8(i) settlement based on an unspecified percentage of impairment. (EX-85, p. 1).

On July 29, 1997, Claimant injured his right knee.[4] (JX-1, p. 23). On September 22, 1997, Dr. Barnes anticipated Claimant's length of disability caused by his July 1997 injury would be approximately six (6) weeks. (EX-140, p. 1). Nevertheless, on October 16, 1997, Dr. Barnes concluded that

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[3] The record does not indicate an impairment rating assigned to Claimant's right knee following this injury. The only reference to such a rating is contained in a letter dated October 26, 1988, from Dr. Cain wherein Dr. Cain stated Claimant's impairment rating following this injury was the same as that indicated in his February 9, 1988 report. (EX-82, p. 2). A copy of this report is not in the record.

[4] The record does not indicate an impairment rating assigned to Claimant's right knee following this injury.

Claimant had no continuing disability from his July 1997 injury. (EX-144, p. 1). Dr. Barnes then determined on November 21, 1997, that Claimant reached maximum medical improvement and was able to continue to work at that time as well as for the rest of his career. (EX-148, p. 1). Notwithstanding his November 21, 1997 determination, on January 20, 1998, Dr. Barnes concluded Claimant's anticipated length of continuing disability was permanent.[5] (EX-150, p. 1).

In 1991 and 1992, Dr. Barnes opined that Claimant would eventually require total knee replacements since each of Claimant's injuries contributed to the worsening of his condition. (EX-125, p. 1; EX-128, p. 1). In 1988, Dr. Cain suggested Claimant might be a candidate for joint replacement arthroplasty in one (1) or both knees in five (5) to ten (10) years. Dr. Cain also suggested that in a few years Claimant might not be able to perform longshore type work. (EX-82, p. 2). In 1991, Dr. Cain again suggested Claimant might eventually be a candidate for joint replacement arthroplasty in one (1) or both knees. In addition, Dr. Cain noted Claimant would eventually reach a point where he could no longer physically perform the tasks of a longshoreman. (EX-124, p. 3).

The Medical Evidence

Dr. Garcia/Shaver Medical Clinic:

On April 20, 1999, Claimant obtained authorization from Employer/Carrier to see Dr. Garcia.[6] (Tr. 93). He met with Dr. Garcia that same day. Dr. Garcia noted Claimant had injured his knees and left ankle at work. Dr. Garcia also noted that an x-ray of Claimant's left knee showed osteophyte formation. He diagnosed Claimant as suffering from left and right knee sprain as well as a left ankle sprain. (JX-6, p. 39). In addition, Dr. Garcia found Claimant's condition was caused or aggravated

[5] The record indicates Claimant was also injured on May 1, 1980, June 10, 1981, November 9, 1984, April 7, 1989, and July 16, 1990. However, the record is devoid of any information indicating whether Claimant injured his knee or knees on any of those occasions. (EX-38, p. 1; EX-39, p. 1; EX-72, p. 1; EX-83, p. 1; EX-84, p. 1).

[6] According to a form LS-202, Dr. Garcia was Claimant's choice of treating physician. (CX-23, p. 1). However, Claimant indicated he did not complete the form LS-202; but, rather was given authorization from Employer/Carrier to see Dr. Garcia. (Tr. 93).

by his employment activity. (JX-5, p. 19). He recommended Claimant take Motrin 800 three (3) times a day and noted Claimant remained off-work. (JX-6, p. 39). On April 27, 1999, Claimant again met with Dr. Garcia and complained of left knee and ankle pain. Dr. Garcia diagnosed Claimant as suffering from left knee and ankle sprain. He recommended Claimant continue to take his medications as well as begin physical therapy. He also noted Claimant remained off-work. (JX-6, p. 38).

On May 5, 1999, Claimant had another appointment with Dr. Garcia during which he complained of persistent pain in his left knee. He also reported that the pain in his ankle was improving. Dr. Garcia diagnosed Claimant as suffering from left knee pain and effusion as well as a left ankle sprain. He recommended Claimant continue to take his medications as well as continue with physical therapy. He also referred Claimant for a MRI of his left knee and again noted that Claimant remained off-work. (JX-6, p. 37).

East Side Imaging, Inc.:

Claimant underwent a MRI of his left knee on May 18, 1999, with Barry P. Wood, M.D. as ordered by Dr. Garcia. (JX-4, pp. 26-27). The MRI showed prominent marginal osteophytes, a one (1) centimeter subchondral degenerative cyst along the articular margin of the medial femoral condyle, chondral thinning within the joint, a large amount of joint effusion, a deformity and abnormal signal in the posterior horn of the medial meniscus that extended into the posterior aspect of the body of the meniscus, generalized increase in signal throughout the anterior horn with a linear extension that intersected the tibial articular margin, grade II intrameniscal signal throughout the lateral meniscus, thickening of the medial collateral ligament as it deviated around prominent marginal osteophytes, and thinning of the patellar cartilage. (JX-4, p. 26). From this MRI, Dr. Wood concluded Claimant suffered from joint effusion, severe degenerative joint disease, extensive deformity and signal increase in the posterior horn of the medial meniscus extending into the body with similar changes in the anterior horn with linear extension, severe degenerative change throughout the lateral meniscus, thickening of the medial collateral ligament as it deviates around prominent marginal osteophytes, and chondromalacia of the patella. (JX-4, p. 27).

Dr. Weiner/East Houston Orthopedics & Sports Medicine, P.A.:

Originally, Claimant requested authorization to see Dr. Barnes regarding treatment of his knees since Dr. Barnes had previously treated knee injuries he had suffered. (Tr. 95-96). However, an appointment with Dr. Barnes could not be secured. (Tr. 95). Employer/Carrier was able, however, to secure Claimant an appointment with Dr. Weiner. (Tr. 98). Claimant met with Dr. Weiner on May 24, 1999. Claimant told Dr. Weiner he injured his knees and his left ankle on April 16, 1999, when he was aboard a vessel. Dr. Weiner noted Claimant had severe problems with his knees for years and had undergone multiple surgeries. Dr. Weiner also noted Claimant's knees would occasionally swell and "give-way" prior to his April 16, 1999 accident. Upon examining Claimant, Dr. Weiner noted crepitus present on Claimant's knees. Claimant's range of motion was approximately 3° to 120°. X-rays of Claimant's knees showed severe arthritis. Dr. Weiner diagnosed Claimant as suffering from severe osteoarthritis and chose to administer an injection of Xylocaine and Cortisone into Claimant's knees. In addition, Dr. Weiner recommended Claimant continue to take Ibuprofen as prescribed. (JX-4, pp. 13, 25). Dr. Weiner also recommended Claimant undergo a knee replacement because of his pre-existing condition.[7] He noted it would be "months" before Claimant reached maximum medical improvement. (JX-4, p. 25).

During Claimant's next appointment with Dr. Weiner on June 7, 1999, Claimant complained of continuing pain in his left knee and ankle. (JX-4, pp. 14, 24; JX-6, p. 46). Dr. Weiner provided Claimant with an unloader brace for his knee and an elastic anklet for his ankle. (JX-4, pp. 14, 24, 30). Dr. Weiner noted that although Claimant's knee pain was the result of a pre-existing condition, his condition was aggravated by his April 16, 1999 accident. Dr. Weiner again concluded Claimant would need a total knee replacement for which he felt Employer/Carrier was not liable for financing.[8] Dr. Weiner also

[7] Dr. Weiner does not specify in his May 24, 1999 report whether or not Claimant would need a single or bilateral knee replacement. He does specify, however, in his November 1, 1999 report that Claimant needs to undergo bilateral knee replacements which he believes are unrelated to Claimant's April 16, 1999 accident. (JX-4, pp. 22, 25).

[8] Again, Dr. Weiner did not specify in his June 7, 1999 report whether or not Claimant needed a single or bilateral knee replacement. He did specify, however, in his November 1, 1999 report that Claimant needed to undergo bilateral knee

concluded Claimant would reach maximum medical improvement in six (6) to eight (8) weeks and that he could return to full-time work on June 8, 1999. (JX-4, p. 24).

On July 15, 1999, Claimant met again with Dr. Weiner. (JX-6, p. 45). He told Dr. Weiner his knee felt much better; that the unloader brace helped. (JX-4, p. 14). After examining Claimant, Dr. Weiner provided Claimant with an order for large heel pads. (JX-4, pp. 14, 29). Dr. Weiner also provided Claimant with a prescription for Vioxx. (JX-4, pp. 17-18). Dr. Weiner next met with Claimant on August 30, 1999. (JX-5, p. 22). Claimant told Dr. Weiner his knee felt "decent," but complained of continuing pain in his left ankle. Dr. Weiner administered an injection of Xylocaine and Cortisone into Claimant's heel and provided Claimant with an order for large heel pads. (JX-4, pp. 15, 23, 28). Claimant's next appointment with Dr. Weiner was on November 1, 1999. He complained to Dr. Weiner of pain and stiffness in his knee as well as pain in his left heel. Dr. Weiner noted Claimant still needed to undergo total knee replacements, but felt that the need for such procedures was not related to Claimant's April 16, 1999 accident. Dr. Weiner also noted Claimant could presently live with his pain. (JX-4, pp. 15, 22).

Dr. Weiner last met with Claimant on March 2, 2000, during which time Claimant complained of knee and heel pain. Dr. Weiner noted Claimant had met with Dr. Braly and that Dr. Braly's treatment of Claimant's ankle injury had not helped Claimant. He believed he better helped Claimant's ankle injury through his injection of Xylocaine and Cortisone into Claimant's ankle on August 30, 1999. He administered another injection of Xylocaine and Cortisone into Claimant's ankle and told Claimant to return to see him as necessary. (JX-4, pp. 16, 21). He also concluded Claimant had reached maximum medical improvement. (JX-4, p. 21).

On April 24, 2006, Dr. Weiner completed a questionnaire for Employer/Carrier wherein he indicated his opinion regarding Claimant's need for bilateral total knee replacement as being unrelated to Claimant's April 16, 1999 accident had not changed. He also indicated he agreed with Dr. Freeman's March 9, 2005 report wherein Dr. Freeman concluded Claimant's knees would be as they are whether or not he suffered an injury on April 16, 1999. (EX-160, p. 1). Therefore, Dr. Weiner concluded

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replacements which he believed were unrelated to Claimant's April 16, 1999 accident. (JX-4, pp. 22, 24).

Employer/Carrier was no longer responsible for providing Claimant with medical treatment. He also concluded Claimant reached maximum medical improvement on October 16, 1999. (EX-160, p. 2).

Dr. Barnes/Frank L. Barnes Professional Association:

Dr. Barnes previously treated Claimant for knee injuries he had suffered and was Claimant's preferred orthopedic specialist. (Tr. 95-96). However, Claimant was unable to obtain authorization from Employer/Carrier to see Dr. Barnes. (Tr. 95). Nevertheless, Claimant met with Dr. Barnes on May 23, 2001. Dr. Barnes concluded after examination that Claimant suffered from post-traumatic osteoarthritis of the knees. He prescribed Naprelan and Davron-65 for Claimant. (JX-1, pp. 12, 33).

Dr. Braly/Fondren Orthopaedic Group:

Following an informal conference at the Department of Labor concerning Claimant's request to see another physician regarding his ankle, Claimant was given authorization to see Dr. Braly. (Tr. 99). Claimant met with Dr. Braly on November 29, 1999, for an initial consultation. (JX-1, p. 24). Claimant told Dr. Braly he injured his knees and left ankle while working on a ship. (JX-5, p. 33). After examining Claimant, Dr. Braly concluded Claimant suffered from a probable severe inversion injury in his left foot/ankle, resultant severe lateral sprain in his left foot/ankle, possible chronic lateral instability in his left ankle with contributing genuvarum, bilateral post-traumatic/degenerative knee arthritis, bilateral genuvarum, and possible traumatically induced plantar fasciitis. (JX-1, pp. 24-25). Dr. Braly recommended Claimant undergo a MRI in order to rule out any occult soft tissue and/or chondral pathology. Dr. Braly met again with Claimant on December 22, 1999. Dr. Braly informed Claimant of the results of his MRI, namely, that the MRI was significant in regard to plantar fasciitis. According to Dr. Braly, the results of Claimant's MRI showed changes in the anterolateral aspect of Claimant's ankle. (JX-1, p. 25). As such, Dr. Braly prescribed arch supports, physical therapy, and medication for treatment of Claimant's ankle. (JX-1, p. 25; JX-5, pp. 13, 16).

On February 2, 2000, Claimant met with Dr. Braly and complained of significant medial heel pain. Dr. Braly noted Claimant needed to correct the placement of his arch support pad in his shoe. Besides correcting the placement of his arch

support and providing Claimant with another prescription for arch supports, Dr. Braly also recommended Claimant continue his physical therapy and continue to take his medications. (JX-1, p. 25; JX-5, pp. 14, 16). Dr. Braly next met with Claimant on June 7, 2000. Claimant continued to complain of significant left heel pain. Dr. Braly noted Claimant's heel pain was refractory to conservative treatment. Dr. Braly recommended surgery and also provided Claimant with a prescription for arch supports. (JX-1, p. 26; JX-5, p. 13). Claimant underwent surgery to his left heel on July 20, 2000, and was prescribed Phenergan, Keflex, and Vicodin. (JX-1, pp. 26-27; JX-5, p. 15). Following his surgery, Claimant met with Dr. Braly on July 24, 2000. Dr. Braly noted Claimant's surgical wound "looked fine" and strongly recommended Claimant not place too much weight on his left heel for two (2) weeks. (JX-1, p. 26).

Claimant's next appointment with Dr. Braly was on August 1, 2000. Dr. Braly noted Claimant's surgical wound was completely healed and recommended Claimant begin early weight bearing on his heel. In addition, Dr. Braly provided Claimant with a cane. On November 8, 2000, Dr. Braly provided Claimant with a request for physical therapy for his ankle. (JX-5, p. 15). Claimant met again with Dr. Braly on August 30, 2000, and complained of significant post-operative heel pain. Dr. Braly opined that Claimant's pain was probably due to early scar tissue formation. He recommended physical therapy as well as a mid-calf walker brace with a heel pad. (JX-1, p. 26; JX-5, p. 14).

Dr. Braly next met with Claimant on October 4, 2000. He noted that Claimant was doing well and that physical therapy was helpful. In addition, he noted Claimant could return to work in his regular duty capacity as a longshoreman on October 6, 2000. Dr. Braly next saw Claimant on November 8, 2000, during which appointment Claimant complained of pain and swelling possibly brought about by his "overdoing it" at work. Dr. Braly recommended physical therapy and medication. He also recommended Claimant avoid the activity which caused the pain and swelling in his ankle. Claimant's next appointment with Dr. Braly was on June 6, 2001. Claimant reported that he was doing well, but experienced mild discomfort with prolonged standing or walking. Dr. Braly opined that Claimant was nearing maximum medical improvement and suggested Claimant return to his office to discuss an impairment rating.[9] (JX-5, p. 34).

[9] There is no indication in the record that Claimant returned to Dr. Braly's office for such a discussion.

Texas Orthopedic Hospital:

Claimant underwent a MRI of his left knee and ankle on December 17, 1999, with Dr. Vijay G. Gohel as ordered by Dr. Braly. The MRI showed an attenuated appearance at the anterior talofibular ligament suggestive of a strain injury without evidence of a full-thickness tear, and focal regions of high signal intensity dorsal and plantar to the midplantar aponeurosis consistent with mild plantar fasciitis. From this MRI, Dr. Gohel determined Claimant suffered from mild to moderate plantar fasciitis. (JX-5, p. 27).

Dr. Bryan/The Methodist Hospital:

In November 1999, Claimant began to request authorization to see either Dr. Bryan or Dr. Mosley regarding his knees. (Tr. 104). Claimant finally obtained authorization from Employer/Carrier to see Dr. Bryan in 2004. (Tr. 111-112). Dr. Bryan met with Claimant on April 2, 2004. Claimant told Dr. Bryan he injured his knees in 1999. He also told Dr. Bryan while he was able to return to work following conservative treatment of his knees, he has always favored his knees and his pain had progressively worsened. After examining Claimant and obtaining x-rays, Dr. Bryan noted Claimant suffered from clinical obesity as well as significant bilateral knee arthritis. Dr. Bryan administered an injection of Depomedrol and Lidocaine into each of Claimant's knees and recommended he undergo a series of bilateral knee viscous supplementation injections. (JX-2, p. 15).

On September 3, 2004, Claimant met again with Dr. Bryan. Dr. Bryan reviewed Claimant's medical records regarding his left knee and determined Claimant suffered from significant knee osteoarthritis at the time of his accident on April 16, 1999. According to Dr. Bryan, Claimant had pre-existing osteoarthritis in his left knee which could have caused clinical problems by the year 2010. Dr. Bryan concluded Claimant's April 16, 1999 accident exacerbated his pre-existing condition and left him with a 20% impairment of his lower left leg. Dr. Bryan also concluded Claimant's right knee pain was solely the result of osteoarthritis and not a result of his April 16, 1999 accident. However, Dr. Bryan found that in the process of favoring his left knee, Claimant developed an equal amount of arthritic pain in his right knee. In addition, Dr. Bryan found Claimant most

likely reached maximum medical improvement a couple of years earlier. He also found Claimant to be a candidate for bilateral total knee replacements. He opined that Employer/Carrier should pay for Claimant's left total knee replacement. (JX-2, p. 16).

On August 17, 2005, Dr. Bryan noted that Claimant's bilateral knee osteoarthritis had gotten worse and was affecting his daily activities. He also noted Employer/Carrier authorized a total knee replacement for Claimant's left knee. He noted, however, that Claimant's right knee was giving him more trouble and that a total knee replacement for that knee could probably not be done during the same hospitalization due to the "insurance dilemma." He suggested Claimant use his private insurance for total knee replacement of his right knee. (CX-6, p. 2).

On February 28, 2006, Dr. Bryan issued a letter to Claimant wherein he stated Claimant had significant bilateral knee osteoarthritis which was well tolerated until he was injured on April 16, 1999. This injury, according to Dr. Bryan, accelerated the osteoarthritic changes in Claimant's knees. Dr. Bryan noted that although Claimant's April 16, 1999 accident accelerated the osteoarthritic changes in his knees, his left knee had been more symptomatic and had received the most medical attention. Dr. Bryan concluded Claimant should undergo bilateral total knee replacements for his bilateral knee osteoarthritis which was aggravated by the April 16, 1999 injury that also accelerated the need for surgery. (CX-6, p. 1).

Dr. Christensen/Park Plaza Orthopaedic Associates:

Claimant was referred to Dr. Christensen for examination by the Department of Labor. (Tr. 116; CX-8, p. 3). He initially met with Dr. Christensen on June 7, 2005. Claimant told him he injured his knees when he slipped on the deck of a ship on April 16, 1999. According to Dr. Christensen, Claimant told him his left knee received the "brunt of the injury." Claimant also complained to Dr. Christensen of pain in his knees as well as discomfort in his knees when walking any distance. In addition, he complained to Dr. Christensen of having difficulty standing. (JX-6, p. 51). Upon examination of Claimant, Dr. Christensen noted Claimant's knees could be extended to minus 5° and flexed to 120°. He also noted that x-rays of Claimant's knees indicated Claimant suffered from medial joint arthritis, but that his right knee might be slightly worse than his left. Dr. Christensen diagnosed Claimant as suffering from osteoarthritis. Dr. Christensen concluded Claimant's April 16, 1999 accident,

without a doubt, accelerated Claimant's arthritic condition in his knees. He also concluded within reasonable medical probability that Claimant's April 16, 1999 accident exacerbated his osteoarthritis. He recommended Claimant undergo knee replacement surgery.[10] He also noted that although it appeared Claimant was fit to return to duty, there was no guarantee that he would not be re-injured or suffer an additional injury at work. (JX-6, p. 52).

Claimant was re-examined by Dr. Christensen on January 26, 2006. Dr. Christensen noted Claimant continued to experience an inability to walk for periods of time and continued to complain of knee pain. Dr. Christensen also noted x-rays of Claimant's knees indicated Claimant suffered from advanced osteoarthritis, predominantly medially. According to Dr. Christensen, osteoarthritis is an inherited trait. Nevertheless, Dr. Christensen concluded Claimant's osteoarthritis might well have been exacerbated by his April 16, 1999 accident. After examining Claimant's knees, Dr. Christensen determined the degenerative changes in Claimant's knees were the same in each knee. He noted that Hyaluronate injections into Claimant's knees would provide temporary relief and recommended knee replacement surgery for long-term relief.[11] (JX-6, p. 14). In addition, he noted that while it appeared Claimant was fit to return to duty, there was no guarantee that he would not be re-injured or suffer an additional injury at work. (JX-6, p. 15).

Dr. Freeman/Orthopaedic Medicine, P.A.:

Dr. Freeman met with Claimant on March 9, 2005, for the purposes of providing a medical evaluation at Employer/Carrier's request. (Tr. 114-115; JX-6, p. 19). Dr. Freeman noted Claimant twisted his left knee and ankle and also experienced pain in his right knee after he slipped and fell in a hold on a ship on April 16, 1999. (JX-6, p. 19). He also noted that x-rays of Claimant's knees were unremarkable except for showing

[10] Dr. Christensen did not specify in his June 7, 2005 report whether or not Claimant needs a single or bilateral knee replacement. He indicated, however, that Claimant's left knee was the reason for his consultation with Claimant, but also indicated that Claimant's April 16, 1999 accident accelerated the arthritic condition in both knees. (JX-6, pp. 51-52).

[11] Again, Dr. Christensen did not specify in his January 26, 2006 report whether or not Claimant needed a single or bilateral knee replacement. However, he referred to Claimant's "knees" throughout this report. (JX-6, p. 14).

that Claimant suffered from severe pre-existing arthritis. He noted that he had reviewed medical records from Drs. Braly and Bryan. He indicated that he respectfully disagreed with Dr. Bryan's conclusion that Claimant's April 16, 1999 accident exacerbated and accelerated Claimant's degenerative changes. He opined, rather, that Claimant's marked degenerative existing joint arthritis had simply progressed inexorably. Dr. Freeman concluded in reasonable medical probability that Claimant's knees would be as they are now regardless of whether or not he suffered an injury on April 16, 1999. (JX-6, p. 20).

The Wage and Earnings Evidence

According to ILA Local 24 records, in the year preceding his April 16, 1999 injury, Claimant worked a total of 1,832.75 hours. (EX-163, p. 2). In addition, the records indicate Claimant worked a total of 1,318 hours in 2000, 1,796 hours in 2001, 1,752 hours in 2002, 1,879 hours in 2003, 1,900 hours in 2004, and 1,679 hours in 2005. (CX-25, p. 3). According to records from West Gulf Maritime Association, from December 24, 2004 through December 23, 2005, Claimant worked a total of 1,530.25. (CX-20, p. 20). Records from West Gulf Maritime Association also indicate that from December 24, 2005 to March 9, 2006, Claimant worked a total of 286.50 hours. (CX-20, p. 37).

Of the 1,832.75 hours Claimant worked in the year preceding his injury, 846.75 of those hours were for work as a gang foreman. (Tr. 180; EX-163, p. 2). Thus, Claimant worked 46% of the year preceding his injury as a gang foreman. (Tr. 180-181). From April 16, 1999 to February 28, 2006, Claimant worked a total of 11,299.50 hours, 4,936 hours of which were for work as a gang foreman. (Tr. 181; EX-156, p. 28). In all, Claimant worked as a gang foreman 44% of the time during the period of April 16, 1999 to February 28, 2006. (Tr. 182).

Claimant's tax returns indicate he earned $78,117.42 in 1998, $56,789.72 in 1999, $59,171.45 in 2000, $81,550.09 in 2001, $82,593.00 in 2002, $83,750.00 in 2003, and $94,401.00 in 2004. (CX-19, pp. 3, 11, 18, 25, 33, 41, 56). At the time of his injury, the hourly rate for a longshoreman on a fully automated vessel was $24.00. Currently, the hourly rate is $28.00. (Tr. 61-62).

The Contentions of the Parties

Claimant contends he established a **prima facie** case of an injury to both his knees as well as his left ankle. Claimant further contends the injury to his knees accelerated and exacerbated his pre-existing osteoarthritic condition of his knees to the point that, according to Drs. Bryan and Christensen, he now requires bilateral total knee replacements. Since he now requires bilateral total knee replacements, Claimant maintains he has not reached maximum medical improvement. Claimant also argues that since his April 16, 1999 accident accelerated and exacerbated his pre-existing ostearthritic condition to the point that he now requires bilateral total knee replacements, he is entitled to undergo those surgeries under the Act.

In addition, Claimant contends he is entitled to temporary partial disability compensation for those time periods he was unable to work as many hours as he had prior to his April 16, 1999 accident because of his increased knee pain. Claimant further contends he should be awarded temporary total disability compensation from this point forward so that he may suspend his work activities and pursue the recommended knee replacements. Lastly, Claimant contends Section 10(c) of the Act should be used to determine his average weekly wage. According to Claimant, his average weekly for the fifty-two (52) weeks prior to his accident was $1,424.36, inclusive of his container royalty payment.

Employer/Carrier contend Claimant failed to establish that he suffered an injury on April 16, 1999, since Drs. Weiner and Freeman concluded Claimant would need bilateral total knee replacements whether or not he was injured on April 16, 1999, because of the natural progression of his pre-existing osteoarthritis. In the alternative, Employer/Carrier argue Claimant failed to demonstrate an aggravation or acceleration of the osteoarthritis of his right knee. Therefore, Employer/Carrier argue, at the very least, if Claimant is entitled to compensation and benefits, he is not entitled to medical treatment for his right knee.

Employer/Carrier also contend Claimant reached maximum medical improvement on October 16, 1999, and is, therefore, not entitled to any further temporary partial disability compensation. In addition, Employer/Carrier maintain Claimant is not entitled to any unpaid temporary partial disability compensation through 2005 since any loss in earnings was the

result of the natural progression of his pre-existing osteoarthritis. Employer/Carrier also argue that Claimant's wage and tax records demonstrate Claimant did not suffer a loss of earnings through 2005. Moreover, Employer/Carrier argue it is premature to calculate any loss in earnings in 2006 since information regarding Claimant's vacation pay, ILA Local 24 bonus, and container royalty payment is unavailable.

Nevertheless, should the undersigned determine Claimant is entitled to disability compensation, Employer/Carrier contend Claimant's average weekly wage in the year preceding his accident was $1,135.11, exclusive of his container royalty payment and his ILA Local 24 bonus. According to Employer/Carrier, Claimant's container royalty payment and ILA Local 24 bonus should not be included in any calculation of Claimant's average weekly wage. Employer/Carrier also argue to the extent, if any, Claimant is awarded compensation benefits, Employer/Carrier are entitled to a credit for amounts previously received by Claimant for prior injuries to his knees. Finally, Employer/Carrier argue, should the undersigned consider it relevant to Claimant's claim, Section 8(f) applies.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988);

Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing, Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

Here, based on the record as a whole and my observations of the witnesses, I am convinced that Claimant is a sincere and honest witness who has demonstrated an extraordinary desire to continue to work. Overall, I was very impressed by Claimant's sincerity and testimony. I was also impressed with the records of Drs. Garcia, Barnes, Braly, Bryan, and Christensen. I was not impressed, however, by Dr. Freeman's records since Dr. Freeman failed to conduct even a cursory physical examination of Claimant, or inquire about Claimant's surgical history or any work limitations brought about by his previous knee injuries.

I was also not impressed by Dr. Weiner's records since, like Dr. Freeman, Dr. Weiner did not inquire about Claimant's surgical history, treatment history, or any work limitations brought about by Claimant's previous knee injuries. Throughout his treatment of Claimant, Dr. Weiner never provided any reasoning to support his conclusions. By way of example, in his June 7, 1999 report he concluded Claimant's April 16, 1999 accident aggravated his pre-existing osteoarthritis and that he needed to undergo total knee replacement which he felt Employer/Carrier should not be required to finance. Without reasoning to support these conclusions, I am unable to reconcile Dr. Weiner's opinions as to how Claimant's April 16, 1999 accident aggravated his pre-existing osteoarthritis but

apparently, according to Dr. Weiner, did not contribute to his need for total knee replacement. Therefore, I accord greater weight to the records of Drs. Garcia, Barnes, Braly, Bryan, and Christensen.

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused**, **aggravated**, or **accelerated** the harm or pain. Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter, 227 F.3d 285, 287 (5th Cir. 2000); O'Kelly v. Department of the Army, 34 BRBS 39, 40 (2000); Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986).

1. Claimant's Prima Facie Case

Claimant contends he suffered a compensable injury on April 16, 1999, when he slipped and fell aboard a vessel and strained or sprained his knees and left ankle. Although Claimant has been diagnosed as suffering from osteoarthritis in both his knees, Claimant contends that his April 16, 1999 accident accelerated or exacerbated his pre-existing condition to such an extent that he now requires bilateral total knee replacements.

Employer/Carrier contend Claimant's osteoarthritis was so severe that the condition of his knees would be as they are now whether or not he suffered an injury on April 16, 1999. In the alternative, Employer/Carrier argue Claimant failed to establish a causally-related acceleration or aggravation of the osteoarthritis of his right knee.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See, Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

In the present matter, Claimant was working as a rigger aboard a vessel on April 16, 1999. While attempting to remove some lashing rods, Claimant slipped and landed on his knees. After he slipped, Claimant experienced sharp pains in his knees and left ankle. According to Claimant, he was not experiencing sharp pains in his knees or left ankle prior to reporting for work on April 16, 1999. Claimant reported his accident to his foreman and a walking foreman on April 16, 1999.[12] A notation regarding his accident was also made on his time-slip. Claimant requested authorization from Employer/Carrier to seek medical treatment on April 20, 1999. Employer/Carrier noted in a Report and Verification of Accident that Claimant had injured his knees and left ankle on April 16, 1999. After which Employer/Carrier provided Claimant with authorization to see Dr. Garcia.

Claimant met with Dr. Garcia on April 20, 1999. Dr. Garcia noted Claimant's injuries were caused or aggravated by his employment. After meeting with Dr. Garcia, Claimant also met with Drs. Weiner, Barnes, Braly, Bryan, and Christensen at varying times from 1999 to 2006.[13] Each of these physicians diagnosed Claimant as suffering from osteoarthritis in **both knees** which each determined was aggravated or worsened by his April 16, 1999 accident. As previously indicated, Dr. Garcia determined Claimant's knee pain was caused or aggravated by his employment. Drs. Barnes and Braly each determined Claimant suffered from post-traumatic osteoarthritis of the knees. Dr.

[12] According to Claimant, he also told one of his co-workers, Mr. Gutierrez, who was working the same area of the vessel on April 16, 1999, that he had injured himself through a slip and fall.

[13] Claimant saw Dr. Braly for treatment of his ankle injury. While Dr. Braly treated Claimant's ankle injury, he also provided Claimant with a diagnosis regarding his knees.

Bryan concluded Claimant suffered from significant bilateral knee arthritis that was well-tolerated until his April 16, 1999 accident, while Dr. Christensen determined Claimant suffered from knee osteoarthritis which was exacerbated by his April 16, 1999 accident. Having established that he suffered a harm or pain on April 16, 1999, and that working conditions and activities on that date could have caused, aggravated, or accelerated the harm or pain, I find Claimant has established a **prima facie** case that he suffered an "injury" under the Act and has demonstrated causation sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See, Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See, Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See, Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, employer must establish that claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See, Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Here, Employer/Carrier rely on a report from Dr. Freeman who concluded Claimant's knees would be as they are now whether or not he suffered an injury on April 16, 1999, to rebut Claimant's Section 20(a) presumption. Employer/Carrier also rely upon responses provided in a questionnaire by Dr. Weiner wherein Dr. Weiner indicated he agreed with Dr. Freeman's conclusion. Dr. Freeman reached his conclusion through review of x-rays of Claimant's knees in addition to review of Drs. Braly and Bryan's records. Dr. Freeman did not, as previously indicated, conduct a physical examination of Claimant, nor did he inquire about Claimant's surgical history or any work limitations brought about by his previous knee injuries. Since during his evaluation of Claimant Dr. Freeman did not bother to conduct a physical examination of Claimant or make inquiries about Claimant's previous knee injuries, I find Dr. Freeman's report lacking credibility sufficient to rebut Claimant's Section 20(a) presumption.

Although Dr. Weiner indicated by response to a questionnaire from Employer/Carrier that he agreed with Dr. Freeman's conclusion regarding Claimant's knees, Dr. Weiner also concluded Claimant's April 16, 1999 accident aggravated his pre-existing osteoarthritis. As indicated above, Dr. Weiner

provided no reasoning to support his conclusions without which I am unable to reconcile his opinions regarding Claimant's knees. Therefore, I find Dr. Weiner's opinion lacking credibility sufficient to rebut Claimant's Section 20(a) presumption and I accord greater weight to the records of Drs. Garcia, Barnes, Braly, Bryan, and Christensen. Consequently, I find Employer/Carrier failed to rebut Claimant's Section 20(a) presumption and, as such, a weighing of all the evidence to determine causation is unnecessary.

B. Nature and Extent of Disability

Having found Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). In other words, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See, Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask, supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

1. Claimant's Knee Condition

Claimant contends he has not reached maximum medical improvement. Employer/Carrier, on the other hand, contend Claimant reached maximum medical improvement on October 16,

1999. Drs. Weiner and Bryan were the only physicians who addressed maximum medical improvement.[14] On April 24, 2006, Dr. Weiner determined Claimant reached maximum medical improvement on October 16, 1999. However, as previously indicated, Dr. Weiner's unreasoned conclusions preclude me from crediting his opinions. Therefore, I find Dr. Weiner's determination regarding Claimant's date of maximum medical improvement non-dispositive of this issue.

On September 3, 2004, Dr. Bryan opined Claimant reached maximum medical improvement "a couple of years ago," leaving Claimant with a 20% impairment of his left leg. While overall I was impressed with the records of Dr. Bryan, I disagree with his opinion on this issue as my review of the record indicates Claimant did not reach maximum medical improvement "years ago." Rather, the record indicates Claimant suffers from osteoarthritis of his knees and that he tolerated his osteoarthritis relatively well prior to his April 16, 1999 accident. According to Claimant, after his April 1999 accident, the pain in his knees progressively worsened. The pain in his knees has increased to such an extent that Claimant has been unable to work in the same capacity as he had prior to his accident. His medical records clearly show conservative treatment has not improved his condition. In addition, both his treating physician, Dr. Bryan, and the Department of Labor's appointed medical evaluator, Dr. Christensen, determined Claimant's best treatment option for meaningful relief is bilateral total knee replacements. Since undergoing bilateral total knee replacements should provide Claimant meaningful relief, I find the record demonstrates Claimant has not reached maximum medical improvement.

Although Claimant has yet to reach maximum medical improvement, he has continued to work in his regular capacity as a longshoreman, except for occasions when he was taken off-work or restricted from working by one of his treating physicians. Claimant was restricted from working entirely for the period of April 20, 1999 to June 8, 1999.[15] He was also restricted from his regular capacity duty from approximately July 16, 2000 to

[14] While Drs. Weiner and Bryan addressed maximum medical improvement, they did so regarding only Claimant's knee condition, not his ankle.

[15] Claimant received temporary total disability compensation in the amount of $756.74 during this time period.

October 6, 2000.[16] Otherwise, he has performed his regular capacity duties and earned his regular wage. Consequently, from June 9, 1999 to present Claimant was neither permanently partially nor totally disabled.

Since his April 16, 1999 accident, Claimant's knee pain has progressively worsened. According to Claimant, he avoided working in some positions as a longshoreman after his accident, such as working automobiles or working as a porter, because of his knee pain. Prior to his accident, Claimant had fourteen (14) job classifications which he could perform. After his accident, the number of job classifications he was able to perform decreased to approximately eight (8) classifications. Besides performing fewer job classifications, Claimant also worked fewer hours after his accident during certain periods, because of the increased pain in his knees. In the year prior to his accident, Claimant worked a total of 1,832.75 hours. In 2000 he worked 1,318 hours, in 2001 he worked 1,796 hours, in 2002 he worked 1,752 hours, in 2003 he worked 1,879 hours, in 2004 he worked 1,900, and in 2005 he worked 1,679 hours.[17] Since Claimant could not perform his regular job classifications or work the same amount of hours he was able to work prior to his accident because of his knee pain, I find Claimant was temporarily partially disabled from April 17, 1999 to December 31, 2002 and from January 1, 2005 to December 31, 2005.[18]

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[16] Claimant received temporary total disability compensation in the amount of $756.74 during this time period as well.

[17] Records from ILA Local 24 indicate Claimant worked 1,679 hours in 2005 while records from West Gulf Maritime Association indicate that from December 24, 2004 to December 23, 2005, Claimant worked a total of 1,530.25 hours. The records from ILA Local 24 appear from my review to be more complete than the records from West Gulf Maritime Association. Therefore, I find Claimant worked a total of 1,679 hours in 2005.

[18] Claimant also argues that he worked fewer hours in 2006. However, as of the hearing date Claimant's wage and earning records for 2006 were incomplete. The records available indicate that from December 24, 2005 to March 9, 2006, Claimant worked a total of 286.50 hours. ILA Local 24 President, Mr. Isbell, opined that should Claimant continue to work at that rate he would work an approximate total of 1,144 hours in 2006. While it is highly probable Claimant worked less in 2006, without complete wage and earning records, I find Mr. Isbell's testimony regarding Claimant's hours for 2006 too speculative to conclusively determine Claimant was temporarily partially disabled that year.

2. Claimant's Ankle Condition

No physician who examined or treated Claimant made a determination as to a date at which Claimant reached maximum medical improvement concerning his ankle condition. Claimant received treatment for his left ankle from Drs. Garcia, Weiner, and Braly. Dr. Garcia prescribed medication and physical therapy while Dr. Weiner administered injections of Xylocaine and Cortisone into Claimant's ankle. Dr. Braly initially prescribed medication and physical therapy for Claimant. He also provided Claimant with orders for arch supports. However, on July 20, 2000, he performed surgery on Claimant's ankle. Following Claimant's surgery, Dr. Braly released Claimant back to full duty on October 6, 2000. On June 6, 2001, Dr. Braly noted Claimant was nearing maximum medical improvement and requested Claimant return to his office to discuss an impairment rating. From the record, it does not appear that Claimant returned to Dr. Braly to discuss such a rating. Although none of the physicians who examined or treated Claimant for his ankle made a determination regarding maximum medical improvement, I find, based on the record, Claimant reached maximum medical improvement on June 6, 2001, the date on which Dr. Braly requested Claimant schedule a follow-up appointment to discuss an impairment rating.

D. Average Weekly Wage

Section 10 of the Act sets forth three (3) alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. §910(a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752 (7th Cir. 1979).

Section 10(a) provides that when the claimant has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. §910(a). In Duncan v. Washington Metro. Area Transit Authority, 24 BRBS 133, 136 (1990), the Board considered 34.5 weeks of "full-time," "steady" or "regular" employment to be "substantially the whole

of the year." Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the **average daily wage** of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). If neither of these two methods "can reasonably and fairly be applied" to determine a claimant's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821 (5th Cir. 1991).

Subsections 10(a) and 10(b) are similar in that they both are a **theoretical approximation** of what the claimant could ideally be expected to earn, ignoring time lost due to strikes, illness, personal business, etc., thus tending to give a higher figure than what the claimant actually earned. Duncan v. Washington Metro. Area Transit Authority, supra, at 136. Section 10(a) differs from Sections 10(b) and (c) in that it looks to the **actual wages** of the injured worker to determine the amount of compensation. Thus, Section 10(a) cannot be applied where there is no evidence from which the average daily wage can be calculated. Lobus v. I.T.O. Corp. of Baltimore, supra, at 140; Taylor v. Smith & Kelly Co., 14 BRBS 489, 495 (1981).

To calculate average weekly wage under Section 10(a), the claimant's actual earnings for the 52 weeks prior to the injury are divided by the number of days he actually worked during that period to determine an average daily wage. The average daily wage is multiplied by 300 for a six-day worker or 260 for a five-day worker and the result is divided by 52 pursuant to Section 10(d) to determine the average weekly wage. 33 U.S.C. §910.

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c).

An Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., 23 BRBS 389 (1990); Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra.

Section 2(13) of the Act provides that:

> The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle c of the Internal Revenue Code of 1954.

33 U.S.C. §902(13). Wages under Section 2(13) include any advantage that is received by a claimant for services rendered which triggers tax withholdings. Universal Maritime Service Corp. v. Wright, 155 F.3d 311, 319 (4th Cir. 1998). The term "wages" does not, however, include fringe benefits, such as employer contributions to union, retraining, retirement, pension, health and welfare, or other benefit plans. Lopez v. Southern Stevedores, 23 BRBS 295 (1990); Newport News Shipbuilding and Dry Dock Company v. Justice, 127 F.3d 1099 (4th Cir. 1997) (wages do not include fringe benefits such as training or educational stipends).

Generally, container royalty payments are part of a claimant's income to be included in average weekly wage calculations. James J. Flanagan Stevedores, Inc. v. Gallagher, 219 F. 3d 426, 432 (5th Cir. 2000). Container royalty payments are made directly to the claimant on the basis of seniority and career hours worked. See generally, Lopez v. Southern Stevedores, supra, at 300-301; McMennamy v. Young & Co., 21 BRBS 351 (1988); Denton v. Northrop Corp., 21 BRBS 37 (1988). Container royalty payments do not, however, count as wages when they are received based on time a claimant is disabled rather than on time a claimant worked. Branch v. Ceres Corp., 29 BRBS 53 (1995), aff'd mem. sub nom. Ceres Corp. v. Branch, 96 F. 3d 1438 (4th Cir. 1996).

In the present matter, Claimant proposes under Section 10(c) that the total of his gross earnings from April 16, 1998 to April 15, 1999, including his container royalty payment and ILA Local 24 "wages," be divided by fifty-two (52) weeks to determine his average weekly wage. ($74,066.72 ÷ 52 = $1,424.36). Employer/Carrier, on the other hand, propose the total of Claimant's gross earnings from April 16, 1998 to April 15, 1999, excluding his container royalty payment and ILA Local 24 "bonus," be divided by fifty-two (52) weeks to determine his average weekly wage. ($59,025.27 ÷ 52 = $1,135.11).

Claimant refers to the money he received in the year preceding his accident from ILA Local 24 as wages and argues that it should be included in his gross earnings. In contrast, Employer/Carrier refers to the money as a bonus and argues that it should be excluded from Claimant's gross earnings as it is not "dependent on or affected by Claimant's ability to work." It is well settled that under Section 2(13) of the Act any taxable advantage to a claimant is considered wages. James J. Flanagan Stevedores, Inc. v. Gallagher, supra; Universal Maritime Service Corp. v. Wright, 155 F.3d at 321. Claimant's wage and earnings records indicate he worked a total of 1,832.75 hours in the fifty-two (52) weeks preceding his accident. In addition, his tax records show taxes were withheld from the money he received from ILA Local 24. As the money Claimant received from ILA Local 24 was for services rendered and was subject to taxation, I find the money to be part of Claimant's wages, as he argues, and not a bonus as suggested by Employer/Carrier.

Claimant relies on James J. Flanagan Stevedores, Inc. to support his position that his container royalty payment should be included in gross earnings for purposes of determining his average weekly wage under Section 10(c). James J. Flanagan Stevedores, Inc. v. Gallagher, supra. Employer/Carrier provided no legal precedent to support their position that Claimant's container royalty payment should not be included in his gross earnings since it is not "dependent on or affected by Claimant's ability to work."

In James J. Flanagan Stevedores, Inc., the Fifth Circuit followed the analysis of the Fourth Circuit in Universal Maritime Service Corp. v. Wright in determining that container royalty payments are "wages" when earned through the work of an employee. James J. Flanagan Stevedores, Inc. v. Gallagher, 219 F. 3d at 433; See also, Universal Maritime Service Corp. v. Wright, supra. Accordingly, in the Fifth Circuit, the Circuit

in which the instant case arose, the term "wages" means "compensation paid by an employer for services rendered by an employee, the value of which may be readily converted into a cash equivalent." James J. Flanagan Stevedores, Inc. v. Gallagher, supra, at 432. Finding that container royalty payments met this definition, the Court affirmed the administrative law judge's decision to include those payments in the claimant's average weekly wage. Id. at 433-434. Based on this holding, Claimant argues that his container royalty payment should be included in his gross earnings in order to determine his average weekly wage.

While container royalty payments are wages when received for services rendered, they do not count as wages when they are received based on time a claimant is disabled rather than time he worked. Branch v. Ceres Corp., supra. In the instant case, Claimant's wage and earnings records show he worked a total of 1,832.75 hours in the fifty-two (52) weeks preceding his accident. The records do not show that he was credited with medical hours during that time. The record indicates Claimant's container royalty payment was based on the number of hours he worked, not for any time during which he was disabled but credited with medical hours. Based on these facts, I find James J. Flanagan Stevedores, Inc. requires inclusion of Claimant's container royalty payment in the computation of his average weekly wage.

Neither Claimant nor Employer/Carrier provided any information to indicate Claimant is either a five (5) or six (6) day worker. Consequently, I am unable to determine Claimant's days actually worked in the 52 weeks prior to his injury and conclude Section 10(a) of the Act cannot be applied. Likewise, I conclude Section 10(b) of the Act cannot be applied as the record shows Claimant worked substantially the whole of the year preceding his accident. As such, I find Section 10(c) is the appropriate standard under which to calculate Claimant's average weekly wage.

Therefore, in calculating Claimant's average weekly wage, his gross annual earnings, including his container royalty payment and ILA Local 24 wages, shall be divided by 52 weeks to achieve his average weekly wage of $1,424.36. ($74,066.72 ÷ 52 = $1,424.36). Based on the average weekly wage, his rate of compensation is determined to be $949.48. ($1,424.36 × .6666 = $949.48). I find this method of computing average weekly wage to be fair and rational under applicable case law and provisions set forth in Section 10(c).

1. Loss of Wage-Earning Capacity

Wage-earning capacity refers to "an injured employee's ability to command regular income as the result of his personal labor." Seidel v. General Dynamics Corp., 22 BRBS 403, 405 (1989)(citing 2 Larson, The Law of Workmen's Compensation §57.51 at 10-164.64 (1987)). The "wage-earning capacity" concept is relevant to awards of compensation pursuant to Sections 8(c)(21) and 8(e) of the Act. 33 U.S.C. §908(c)(21), (e). Section 8(c)(21) provides that an award for unscheduled permanent partial disability be based on the difference between the claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(e) of the Act provides:

> In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

33 U.S.C. §8(e).

A claimant who is temporarily and partially disabled is entitled to the usual measure of benefits but for the limited period of five (5) years. Wages and time lost after the five (5) year period may not be considered in determining the amount of lost wage-earning capacity. St. Regis Paper Co. v. McManigal, 67 F. Supp. 146 (N.D.N.Y. 1946). A claimant who has suffered a scheduled injury, has not reached maximum medical improvement, and is still employed but has sustained a loss of wage-earning capacity is entitled to temporary partial disability benefits based on such loss. Cox v. Newport News Shipbuilding & Dry Dock Co., 9 BRBS 791 (1978), aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). A claimant whose post-injury earnings exceed or are equal to his pre-injury wage has not automatically failed to demonstrate that he suffered a loss of wage-earning capacity. Mangaliman v. Lockheed Shipbuilding Co., 30 BRBS 39 (1996).

Section 8(h) of the LHWCA provides:

> The wage-earning capacity of an injured employee in cases of partial disability under subdivision(c)(21) of this

> section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity.

33 U.S.C. §908(h). However:

> If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the [administrative law judge] may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

Id. An administrative law judge must utilize a two-part analysis in order to determine a claimant's post-injury wage-earning capacity. Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 660 (1979). The first inquiry requires an administrative law judge determine whether the claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity. Randall v. Comfort Control, Inc., 725 F.2d 791, 796 (D.C. Cir. 1984). If the actual wages are unrepresentative of the claimant's wage-earning capacity, the second inquiry requires that the administrative law judge arrive at a dollar amount which fairly and reasonably represents the claimant's wage-earning capacity. Id. at 796-97. If the claimant's actual wages are representative of his wage-earning capacity, the second inquiry need not be made. Devillier v. National Steel & Shipbuilding Co., supra.

A comparison of pre and post-injury wages does not afford an administrative law judge the necessary information to compute lost earning capacity. Walsh v. Norfolk Dredging Co., 22 BRBS 67, 77-78 (1989) (unpublished). The "mere fact that a [claimant] is earning the same or more money [after] his injury is not determinative of whether he has sustained a loss in wage-earning capacity." Frye v. Potomac Elec. Power Co., 21 BRBS 194, 199 (1988); See also, Container Stevedoring Co. v. Director, OWCP, 935 F.2d 1544, 1551 (9th Cir. 1991) (higher present wages did not fairly represent wage-earning capacity where claimant had 20-22% disability, reduced hours, and worked at present job in pain because of family obligations); Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121 (1997).

An administrative law judge must consider the evidence of record in order to determine whether a claimant's post-injury wages fairly and accurately represent his current wage-earning capacity. Brown v. National Steel and Shipbuilding Co., 34 BRBS 195 (2001). For each part of the wage-earning capacity analysis, an administrative law judge must take a number of factors into consideration. The factors to be considered include: physical condition of claimant; claimant's age, education, industrial history; availability of employment; beneficence of a sympathetic employer; claimant's earning power on the open market; whether claimant must spend more time or use more effort or expertise to achieve pre-injury production; whether medical and other circumstances indicate a probable future wage loss due to the work-related injury; loss of overtime; and continuity and stability of claimant's post-injury work. These factors are not exhaustive and every possible factor need not be considered nor assigned an individual monetary value so long as the final determination of wage-earning capacity is based on appropriate factors and is reasonable. Devillier v. National Steel & Shipbuilding Co., 10 BRBS at 661; See also, Jaros v. National Steel & Shipbuilding Co., 21 BRBS 26, 31 (1988) (affirmed administrative law judge's calculation of claimant's loss of wage-earning capacity based on employment as a sheet metal trainee where: (1) claimant requested to be reinstated as sheet metal trainee; (2) claimant only had minor difficulty performing sheet metal work; and (3) physician's report indicated that claimant could perform work).

When a claimant sustains a physical impairment from his injury, but is doing his usual work adequately, regularly, full-time, and without due help, an administrative law judge may find that the claimant's actual wages fairly represent his wage-earning capacity, and he has suffered no loss and is, therefore, not disabled. See, 33 U.S.C. §908(h); Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190, 194 (1984); See also, Darcell v. FMC Corp., Marine & Rail Equip. Div., 14 BRBS 294 (1981) (where an employee is working at a useful job which pre-dates his employment and pays wages commensurate with the work, and he is earning higher wages on the same union scale as he was prior to his injury, he has not suffered a loss in wage-earning capacity); Kendall v. Bethlehem Steel Corp., 3 BRBS 255 (1976), aff'd mem., 551 F.2d 307 (4th Cir.), cert. denied, 434 U.S. 829 (1977).

The party that contends that the claimant's actual wages are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. See, Grage v. J.M. Martinac Shipbuilding, 21 BRBS 66, 69 (1988), aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP, 900 F.2d 180 (9th Cir. 1990); Misho v. Dillingham Marine & Mfg., 17 BRBS 188, 190 (1985); Spencer v. Baker Agric. Co., 16 BRBS 205, 208 (1984); Burch v. Superior Oil Co., 15 BRBS 423, 427 (1983); Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 693 (1980).

In situations where a claimant is permanently partially disabled as the result of a scheduled injury, the claimant is limited to compensation provided by the appropriate schedule provision. Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268 (1980); Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172 (1984). Economic factors are not to be taken into account in calculating disability benefits for a scheduled injury. Rowe v. Newport News Shipbuilding and Dry Dock Co., 193 F.3d 836 (4th Cir. 1999).

a. Claimant's Knee Condition

In the instant case, Claimant contends he is entitled to loss of wage-earning capacity for those time periods he was unable to work as many hours as he had prior to his accident since he has not reached maximum medical improvement. Employer/Carrier, in contrast, contend Claimant is not entitled to a loss of wage-earning capacity since he has worked at or near the level he had prior to his accident.

Claimant is a sixty-five (65) year old male with a tenth grade education who has worked as a longshoreman for approximately thirty-six (36) years. He suffers from knee osteoarthritis which was well-tolerated until he sustained an injury to his knees on April 16, 1999, while working aboard a vessel. Following his April 16, 1999 accident, Claimant was restricted from working from April 20, 1999 to June 8, 1999, after which he returned to work with no restrictions. Upon his return to work, his co-worker, Mr. Suarez, noticed that he had difficulty completing tasks, like releasing lashing rods. Mr. Suarez also noticed Claimant passed on some jobs that he would have accepted prior to his accident. In addition, Claimant complained of knee pain to Mr. Suarez. As a result, Mr. Suarez assisted Claimant with his work sometimes changing positions with Claimant entirely to allow Claimant to work in less physically demanding positions such as the position of radioman.

Prior to his accident, Claimant had fourteen (14) job classifications which he could perform. After his accident, the number of job classifications he could perform decreased to approximately eight (8) classifications. Claimant's work hours also decreased. In the year prior to his accident, Claimant worked a total of 1,832.75 hours. In 2000 he worked 1,318 hours, in 2001 he worked 1,796 hours, in 2002 he worked 1,752 hours, and in 2005 he worked 1,679 hours. In sum, Claimant worked 514.75 hours less in 2000, 36.75 hours less in 2001, 80.75 hours less in 2002, and 153.75 hours less in 2005.

Claimant's co-worker, Mr. Suarez, works in the same capacity as Claimant. When he is chosen as gang foreman, he makes a special effort to ensure Claimant is assigned to his gang. Claimant likewise ensures Mr. Suarez is a member of his gang when he is chosen as gang foreman. Although Claimant and Mr. Suarez work in the same capacity as longshoremen, Mr. Suarez consistently works more hours than Claimant. Claimant is not prevented from working the same hours as Mr. Suarez because of a lack of available work; rather, Claimant's knee pain and accompanying discomfort prevent him from working the same hours as Mr. Suarez.

Claimant's knee pain and discomfort have also prevented him from performing the same job classifications he could prior to his accident as well as prevented him from working the same or more hours he worked prior to his accident. Claimant has been able to work as much as he has following his April 1999 accident due in large part to his selectivity in choosing which jobs to perform in addition to the assistance of Mr. Suarez. Considering Claimant's age, background, physical limitations brought about by his knee pain, extraordinary effort to continue working in the same capacity he did prior to his accident, I find Claimant established a loss of wage-earning capacity in the years 2000, 2001, 2002, and 2005.[19]

[19] Although Claimant worked fewer hours in 2000, 2001, 2002, and 2005, he worked more hours in 2003 and 2004 than he had in the year prior to his accident. In 2003, he worked a total of 1,879 hours and in 2004 he worked a total of 1,900 hours. It is likely Claimant was able to work these amounts of hours as well through his job selectivity and assistance of Mr. Suarez. I express no opinion on the matter, since neither party argued a loss of wage-earning capacity during these time periods.

Therefore, in calculating Claimant's loss of wage-earning capacity, his gross earnings in the year prior to his accident shall be divided by his associated annual hours to determine an appropriate hourly rate. ($74,066.72 ÷ 1831.75 = $40.41). This hourly rate shall then be multiplied by the difference of hours Claimant worked in 2000, 2001, 2002, and 2005 versus the hours he worked in the year prior to his accident to determine his loss of wage-earning capacity for each year. (1832.75 – 1318.00 = 514.75 × $40.41 = $20,801.05 for year 2000, corresponding compensation amount of $13,865.98 ($20,801.05 × .6666 = $13,865.98); 1832.75 – 1796.00 = 36.75 × $40.41 = $1,485.07 for year 2001, corresponding compensation amount of $989.95 ($1,485.07 × .6666 = $989.95); 1832.75 – 1752.00 = 80.75 × $40.41 = $3,263.11 for year 2002, corresponding compensation amount of $2,175.19 ($3,263.11 × .6666 = $2,175.19); 1832.75 – 1679.00 = 153.75 × $40.41 = $6,213.04 for year 2005, corresponding compensation amount of $4,141.61 ($6,213.04 × .6666 = $4,141.61)). I find this method of calculating Claimant's loss of wage-earning capacity to be fair and reasonable under applicable case law and provisions set forth in Sections 8(e) and (h).

b. Claimant's Ankle Condition

Claimant reached maximum medical improvement on June 6, 2001 for his ankle injury. Although he reached maximum medical improvement, he did not return to Dr. Braly to obtain an impairment rating. He did, however, return to work in his regular duty capacity after his release to work on October 6, 2000, following his convalescence from ankle surgery. As Claimant was able to return to work in his regular duty capacity, he was not totally disabled. Considering that Dr. Braly requested Claimant return to his office to discuss an impairment rating, presumably he suffers from some degree of residual disability. A permanent partial disability of an ankle is a scheduled injury. An impairment rating is essential to a determination of disability benefits for such an injury since compensation for a scheduled injury is limited to the appropriate schedule provision. Accordingly, an award of loss of wage-earning capacity for a scheduled injury is inappropriate. Since Claimant did not obtain an impairment rating, I am unable to determine an award of compensation under the schedule.

E. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a).

The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. §702.402. A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187. Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

In this case, the record indicates Claimant has suffered numerous injuries to his knees and was advised as early as 1997 that he might need to undergo knee replacement surgery. The record also clearly indicates Claimant injured **both** his knees and his left ankle when he slipped and fell while working aboard a vessel on April 16, 1999. The record additionally indicates Claimant was able to regularly work in his ordinary capacity as a longshoreman despite his pre-existing knee osteoarthritis until he suffered an injury to his knees on April 16, 1999. After he was injured on April 16, 1999, the record indicates Claimant worked less hours in certain periods, worked with the assistance of a co-worker, and performed less job classifications.

Claimant received treatment for his injuries from Drs. Garcia, Weiner, Barnes, Braly, and Bryan. He was diagnosed as suffering from pre-existing knee osteoarthritis which was aggravated by his April 1999 accident and accelerated his need for bilateral total knee replacements as well as plantar faciitis. Claimant was permitted to undergo surgery to his ankle on July 20, 2000, to alleviate his plantar faciitis. However, he was denied authorization to undergo bilateral total knee replacements, or at the very least, total knee replacement of his left knee.

Claimant was scheduled to undergo a total knee replacement of his left knee in the summer of 2004. He cancelled the surgery, however, after he discovered Employer/Carrier would not pay for the procedure. Employer/Carrier maintain Claimant's need for knee replacements is due solely to his pre-existing osteoarthritis. Presumably, that is why Employer/Carrier refused to pay for Claimant's total knee replacement of his left knee. In all, Claimant received treatment for his knee injuries from Drs. Garcia, Weiner, Barnes, and Bryan. Claimant was also evaluated by Employer/Carrier's physician, Dr. Freeman, as well as the Department of Labor's appointed physician, Dr. Christensen.

Drs. Garcia and Barnes both diagnosed Claimant as suffering from pre-existing osteoarthritis that was aggravated by his April 1999 accident, but expressed no opinions as to a need for him to undergo bilateral total knee replacements. Dr. Weiner diagnosed Claimant as suffering from pre-existing osteoarthritis which was aggravated by his April 1999 accident. He recommended Claimant undergo bilateral total knee replacements, but opined that the need for such procedures was due to Claimant's pre-existing osteoarthritis. As previously indicated, Dr. Weiner did not provide any reasoning to support his conclusions without which I am unable to reconcile his opinions as to how Claimant's April 16, 1999 accident aggravated his pre-existing osteoarthritis but apparently, according to Dr. Weiner, did not contribute to his need for total knee replacements. Therefore, I accord no weight to Dr. Weiner's opinions.

Dr. Bryan diagnosed Claimant as suffering from significant bilateral knee arthritis. He determined that Claimant's pre-existing osteoarthritis in his left knee could have caused clinical problems by the year 2010. He concluded Claimant suffered from significant bilateral knee osteoarthritis which was well tolerated until April 16, 1999. He found Claimant's April 16, 1999 accident exacerbated his pre-existing

osteoarthritis and accelerated his need for bilateral total knee replacements. Dr. Christensen diagnosed Claimant as suffering from knee osteoarthritis that "without a doubt" was accelerated by his April 16, 1999 accident. He determined within "reasonable medical probability" that Claimant's April 16, 1999 accident exacerbated his knee osteoarthritis and recommended Claimant undergo knee replacement surgery. Dr. Freeman, on the other hand, disagreed with Dr. Bryan's conclusions and determined in "reasonable medical probability" that Claimant's knees would be as they are whether or not he was injured on April 16, 1999. As previously indicated, Dr. Freeman failed to conduct even a cursory physical examination of Claimant, or inquire about Claimant's surgical history or any work limitations brought about by his previous knee injuries. Therefore, I accord no weight to Dr. Freeman's opinion.

From these facts, it is clear that while Claimant indeed suffered from pre-existing osteoarthritis, his osteoarthritis was well-tolerated until his April 16, 1999 accident. Both Drs. Bryan and Christensen determined Claimant's April 16, 1999 accident accelerated his need for bilateral total knee replacements. I concur with Drs. Bryan and Christensen's reasoned opinions and find Claimant is entitled to medical benefits under the Act for treatment of his knees, including bilateral total knee replacements.

V. SECTION 8(f) RELIEF

Section 8(f) of the Act provides in pertinent part:

> (1) In any case which an employee having an existing permanent partial disability suffers [an] injury . . . of total and permanent disability or of death, found not to be due solely to that injury . . . the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.
>
> (2)(A) After cessation of the payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44.

33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. v. Director, OWCP, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability, (2) the pre-existing disability was manifest to the employer, and (3) the current disability is not due solely to the employment injury. 33 U.S.C. §908(f); Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750 (5th Cir. 1990); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C&P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. C&P Telephone Co. v. Director, OWCP, supra, at 513. Disability as defined in Section 8(f) is not confined to conditions which cause purely economic loss. Id. Disability includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-99 (5th Cir. 1977).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have

incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, 782 F. 2d 513, 516-517 (5th Cir. 1986)(en banc).

In this case, the record shows Claimant received several awards of compensation for permanent partial disability of each of his knees. However, Claimant has not reached maximum medical improvement following his most recent injury to his knees on April 16, 1999. Accordingly, Claimant is not now totally and permanently disabled. Therefore, I find application of Section 8(f) relief premature.

VI. SECTION 14(e) PENALTY

Section 14(e) of the Act provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. §914(e); See also, National Steel & Shipbuilding Co. v. Bonner, 600 F. 2d 1288, 1294 (9th Cir. 1997); Garner v. Olin Corp., 11 BRBS 502 (1979).

Assessment of a Section 14(e) penalty ceases whenever the employer complies with the requirements of Section 14(d) and files its notice of controversion. Oho v. Castle and Cooke Terminals, Ltd., 9 BRBS 989 (1979)(Miller dissenting); Scott v. Tug Mate, Inc., 22 BRBS 164, 169 (1989). If the employer fails to file a notice of controversion, the Section 14(e) penalty runs until the date of the informal conference. Grbic v. Northeast Stevedoring Co., 13 BRBS 282 (1980)(Miller

dissenting). Even when the employer voluntarily pays compensation, the Section 14(e) penalty is applicable to the difference between the amount voluntarily paid and the amount determined to be due. Alston v. United Brands Co., 5 BRBS 600 (1977). An employer, however, is not required to file a notice of controversion until a dispute arises over the amount of compensation due. Mckee v. D.E. Foster Co., 14 BRBS 513 (1981).

In the present matter, Claimant was injured on April 16, 1999. Employer/Carrier was notified of Claimant's injury that same day. Employer/Carrier voluntarily paid Claimant temporary total disability compensation from April 17, 1999 to June 11, 1999, as well as from July 16, 2000 to June 9, 2001, the only time periods during which Claimant was restricted from working. Employer/Carrier filed Notices of Controversion with the District Director on October 4, 1999, June 26, 2001, February 12, 2002, and on October 25, 2002. From the record it appears that as of September 21, 2000, the parties were disputing temporary total disability and were scheduled to attend an informal conference concerning the matter on October 13, 2000. The specifics of this dispute were not provided by either party. Without the specific date as to when the dispute arose, I am unable to determine whether Section 14(e) penalties apply. Therefore, I find application of Section 14(e) penalties inappropriate under these facts.

VII. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982)". Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director.

This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VIII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[20] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

IX. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant temporary partial disability compensation benefits based on a loss of wage-earning capacity for the years 2000, 2001, 2002, and 2005, in accordance with the provisions of Sections 8(e) and (h) of the Act consistent with this Decision and Order. 33 U.S.C. §908(e), (h). For the year 2000, Employer/Carrier shall pay Claimant a loss of wage-earning capacity of two-thirds of the difference between his pre-injury annual earnings, specifically, two-thirds of $20,801.05. For the year 2001, Employer/Carrier shall pay Claimant a loss of wage-earning capacity of two-thirds of the

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[20] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **September 30, 2005**, the date this matter was referred from the District Director.

difference between his pre-injury annual earnings, specifically, two-thirds of $1,485.07. For year 2002, Employer/Carrier shall pay Claimant a loss of wage-earning capacity of two-thirds of the difference between his pre-injury annual earnings, specifically, two-thirds of $3,263.11. For year 2005, Employer/Carrier shall pay Claimant a loss of wage-earning capacity of two-thirds of the difference between his pre-injury annual earnings, specifically, two-thirds of $6,213.04.

2. Employer/Carrier shall pay Claimant compensation for temporary total disability from the date he is restricted from working to undergo bilateral total knee replacements until the date at which he is released back to work, based on Claimant's average weekly wage of $1,424.36, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. §908(b).

3. Employer/Carrier is responsible for and shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's April 16, 1999, work injury, including bilateral total knee replacements, pursuant to the provisions of Section 7 of the Act. 33 U.S.C. §907.

4. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

5. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. §1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

6. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 2nd day of April, 2007, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge